



A STUDY OF PART 3 *LOCAL GOVERNMENT (BUILDING & MISCELLANEOUS PROVISIONS) ACT 1993 (TAS)*

Is it Effective Regulation for Subdivision in Tasmania?

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at the Faculty of Law, University of Tasmania

DECLARATION

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ABSTRACT

This thesis studies Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas), which is the prevailing legislation for subdivision in Tasmania. As such, Part 3 plays an important role in Tasmania's planning regulatory system. That system is currently the subject of significant reform. The reform program does not, however, include a review of Part 3. The study undertaken by this thesis conducts a limited review of Part 3 and that study and review is informed by theory as to the effectiveness of regulation. Regulatory theorists identify review of regulation as an important means of ensuring it is effective. Such review serves to identify issues that detract from the effectiveness of regulation and is a means by which regulation may be refined and remain relevant and efficient. This study notes issues that reduce the effectiveness of Part 3 as regulation of subdivision in Tasmania. Those issues include out-dated, unclear language, provisions that reflect now redundant policy, and cumbersome procedures.

This study also raises other broader and more far-reaching issues. The lack of integration of Part 3 into the planning system established under the *Land Use Planning and Approvals Act 1993* (Tas) has implications for the ability of Tasmania's planning system to operate as a cohesive and integrated whole. This examination also highlights the uneasy interaction between subdivision regulation as part of a planning system founded in public policy and the Torrens land registration system that is focused on the registration of paramount interests in land. This study of Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) calls attention to the complexities that arise from that interaction and points to some of the implications of failing to adequately address them.

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CHAPTER 1 - INTRODUCTION

This thesis studies Part 3 *Local Government (Building and Miscellaneous Provisions) Act 1993 (Tas)*, legislation that is part of Tasmania's planning and local government regulatory system. Part 3 was introduced as part of substantial review and reform of Tasmania's local government and planning legislation that took place in 1993. The planning reforms were focused on the *Land Use Planning and Approvals Act 1993 (Tas)* ('LUPAA') and the *State Policies and Projects Act 1993 (Tas)*. Five bills were also introduced to reform the local government legislation. The Local Government (Building & Miscellaneous Provisions) Bill 1993 was one of them. Part 3 of the Bill was a means of transposing the existing regulation for subdivision from the *Local Government Act 1962* into the 1993 LUPAA system. The solution was intended to be temporary only. It was to be a means of enabling local government to carry out the important functions assigned to it of regulating health, building, and subdivision pending the drafting of new legislation to replace it in the coming months.¹ The Act has however not been repealed and Part 3 still applies.

Section 122 of Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993 (Tas)* provides that it is the prevailing legislation for subdivision in Tasmania. Acknowledging the importance of planning regulation and the complexity of the task it faces, this thesis has chosen to present a study of Part 3 and to ask whether it is effective as regulation for subdivision in Tasmania and as part of Tasmania's planning system.

The aim of this thesis is to make a timely and relevant contribution to the practical world in which Part 3 applies, at a time when substantial reform is again underway for Tasmania's planning system. The study of Part 3 is conducted through analysis of the results of both empirical and doctrinal research in the context of the work of theorists who have considered how

¹ Tasmania, *Parliamentary Debates*, Legislative Council, 10 November 1993, 4588 (P McKay).

regulation is or is not effective. With the aim of anchoring the research of this thesis in that practical world, the author conducted interviews with those working on a daily basis with Part 3 in Tasmanian legal, planning, surveying and land registration systems. Regulatory theory as to the effectiveness of regulation is employed as a framework and background to the discussion of the issues raised by the interviewees. Doctrinal analysis of the legislation is also applied against that framework and background.

I PART 3 AND TASMANIAN PLANNING REFORMS

In common with other Australian jurisdictions,² the Tasmanian planning system is undergoing significant reform designed to establish a system that will be 'fairer, faster, cheaper and simpler...'³ The current reforms are designed to tackle 'Tasmania's overly complex planning system [that] has been a handbrake on investment and jobs.'⁴ The Property Council of Australia has confirmed that view of Tasmania's planning system as it has consistently awarded the wooden spoon to Tasmania's planning system.⁵ The aims of the Tasmanian Government reflect pressure to streamline the planning process. Such pressure is a common driver of reform to Australian planning systems in a bid to stimulate economic activity.⁶

The centrepiece of the Tasmanian reforms is a single state-wide planning scheme intended to replace the 30 schemes that currently exist. There is however no proposal to review and reform Part 3 of the *Local Government (Building and*

² Productivity Commission of Australia, 'Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment' (Research Report), April 2011, Volume 1, [3.4] summarises recent and proposed Australian planning system reforms; see also Property Council of Australia, 'Development Assessment 2015 Report Card' (Assessment Report) May 2015, Chapter 2; Nicole Gurran, Patricia Austin and Christine Whitehead, 'That sounds familiar! A decade of planning reform in Australia, England and New Zealand' (2014) 51(2) *Australian Planner* 186, Philippa England, 'Regulatory Obesity, the Newman diet and outcomes for planning law in Queensland' (2015) 32 *Environmental and Planning Law Journal* 60.

³ Will Hodgman Premier of Tasmania announcement by Peter Gutwein Treasurer Tasmania 17 May 2014, <http://www.premier.tas.gov.au/releases/tasmanian_planning_reform_taskforce_announced>

⁴ Ibid.

⁵ Property Council of Australia, above n 2, 8-9.

⁶ Peter Williams, 'The course of statutory planning system reform and fast-tracking development' (2014) 31 *Environmental and Planning Law Journal* 439; see also Property Council of Australia, above n 2, 74.

Miscellaneous Provisions) Act 1993. The research of this thesis identifies both a lack of understanding of the role and contents of Part 3 and a failure to integrate Part 3 with the planning system established under *LUPAA* that may explain the failure to appreciate the need for its reform and review.

II THE LACK OF REVIEW

Some of the provisions of Part 3 were carried forward from earlier legislation and in the absence of review and replacement they have become permanent fixtures, irrespective of their relevance or the clarity of their language. An example is s109 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* (Tas).⁷ This one section spans five A4 pages and consists of 9 subsections. The section provides for minimum lot sizes and s 84 of Part 3 prohibits a council from approving a subdivision if any of the lots do not meet the minimum standards of s 109. The *Land Use Planning and Approvals Amendment (Streamlining of Process) Act 2014* enacted streamlining reforms in anticipation of the introduction of the new planning scheme. Sections 84 and 109 of Part 3 were amended by ss 54 and 56 of that Act. The amendments enable less prescriptive planning scheme provisions as to lot size to have effect. Section 109 nevertheless remains. The words of s 109 were carried forward from s 185 of the *Hobart Corporation Act 1947* into s 472 of the *Local Government Act 1962* and thence into Part 3. The section refers to building areas, a classification that is no longer relevant and dates back to a time when subdivision control applied only to land within building areas.⁸

As the need to amend s 84 demonstrates, such prescriptive provisions pre-date the planning system that was established under the *Land Use Planning and Approvals Act 1993* (Tas). They reflect the language and policies of an earlier planning regulatory environment. When it was enacted, Part 3 was not integrated with the *LUPAA* system and it is still not integrated with that system. The Tasmanian Attorney-General referred to Part 3 when she acknowledged in

⁷ This section was referred to with both bemusement and frustration by some of the interviewees spoken to for this thesis, as an example of both archaic language and redundancy. Interviews with Lawyer 1, 19th September 2016; Surveyor 2, 11th October 2016.

⁸ *Local Government Act 1962*, s 470(2).

2014, that despite ‘...years of intent it has not been reviewed or consolidated with *LUPAA* properly.’⁹ Those familiar with its provisions and who are obliged to apply and deal with it on a day-to-day basis have highlighted the lack of review of Part 3 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* (Tas). The Local Government Association of Tasmania, in a submission on the Government’s proposed planning system reforms, reported the opinions of its members. Those members called for priority to be given to the repeal of Part 3 and the incorporation of its provisions into the *Land Use Planning and Approvals Act 1993*.¹⁰

Similar opinions were reported in a 2012 thesis on issues related to Public Open Space in Southern Tasmania. In that thesis, Boss reported on interviews with both council-employed planning and asset management staff and non-council planning staff.¹¹ One of the council employed strategic planning managers described the provisions of Part 3 as ‘...dating back to the Ark.’¹² Boss concluded by identifying the inadequacy of the legislative framework for public open space in new subdivisions as the prime reason why sufficient quality public open space cannot be delivered by the Tasmanian planning system.¹³

III RESEARCH METHODOLOGY, METHOD AND STRUCTURE

A *Introducing Regulatory Theory*

This thesis asks whether Part 3 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* is effective as regulation for subdivision in Tasmania. In both asking and answering that question this thesis has turned to the work of regulatory theorists. Theorists have identified the reasons why we regulate, the form regulation may take, and what it is that renders regulation

⁹ Tasmania, *Parliamentary Debates*, Legislative Council, 19 November 2014, Dr V Goodwin.

¹⁰ Local Government Association of Tasmania, *Submission on reforming Tasmania’s Planning System Position Paper*, 2nd October 2014, 14.

¹¹ Indra Boss, ‘*In what ways do policy and planning deliver quality urban public open space? Perspectives from Southern Tasmania*’ (Masters Thesis, School of Geography & Environmental Studies, University of Tasmania, 2012) 51.

¹² *Ibid.*

¹³ *Ibid.*, 86.

effective and why it may be ineffective. The work of theorists provides a framework and underpinning structure for this study of Part 3.¹⁴

Effectiveness of regulation is central to the framework underpinning this study, and efficiency is a key element of effective regulation. The economic analysis of law conducted by Ronald Coase¹⁵ assists identification of the true costs of regulation. Analysts and designers of regulation have sought to maximise its effectiveness and the concept of responsive regulation has led to the adoption of innovative regulatory techniques. The work of Holley and Gunningham¹⁶ considers the use of those techniques in the design and operation of effective planning and environmental regulation. Karen Yeung's¹⁷ work analyses compliance with regulation and explains how regulation that is viewed as irrelevant or redundant encourages non-compliance.

Regulation is the subject of different definitions,¹⁸ and regulatory tools may be many and varied.¹⁹ Primary legislation is only one of the regulatory tools available as regulation spans a spectrum.²⁰ At one end of the spectrum is decentred regulation that views regulation as extending beyond action and enforcement by the state. At the other end is command-and-control regulation

¹⁴ Julia Black, 'Critical reflections on regulation' (2002) 27 *Australian Journal of Legal Philosophy*, 1, 11; Julia Black *Rules and Regulators* (Clarendon Press 1997); Christine Parker and John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press 2003); Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the deregulation debate*, (Oxford University Press 1992); Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press 2007); Arie Freiberg, *The Tools of Regulation* (The Federation Press 2011); Neil Gunningham and Peter Grabosky, *Smart Regulation, Designing Environmental Policy* (Oxford University Press 1998).

¹⁵ Ronald H Coase, 'The problem of Social Cost' (1960) III *The Journal of Law and Economics* 1;

¹⁶ Cameron Holley and Neil Gunningham, 'Environment Improvement Plans: Facilitative regulation in practice' (2006) 23 *Environmental and Planning Law Journal* 448

¹⁷ Karen Yeung, *Securing Compliance* (Hart Publishing 2004).

¹⁸ Julia Black, 'Critical reflections on regulation' (2002) 27 *Australian Journal of Legal Philosophy*, 1, 1.

¹⁹ For examples of the 'ever expanding concept' of regulation see Julia Black above n 18, 16; and for options available in environmental regulation Gunningham and Grabosky above n 14, Table 'summary of instrument mixes' 428-9.

²⁰ Freiberg, above n 14, 85, Fig 61, 6b 'The tools of government'.

as primarily 'a law and state-centred process of legislative action combined with administrative enforcement.'²¹

This thesis adopts a 'pragmatic approach,'²² and defines regulation according to what it wants to do with it. The aim of this thesis is to study and review Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) in a way that is relevant to and anchored in, the practical world in which the Part is applied. For this thesis, regulation is what the Australian government has defined it as: 'Any rule endorsed by government where there is an expectation of compliance.'²³

Regulatory theorists may refer to regulation as being 'good' or 'bad' as this comment by the editors of the first issue of *Regulation and Governance* demonstrates:

Bad regulation, after all, can do terrible things to people. Good regulation can control problems that might otherwise lead to bankruptcy and war, and can emancipate the lives of ordinary people. Mediocre, unimaginative regulation that occupies the space between good and bad regulation leads to results that are correspondingly between the extremes of good and bad.²⁴

References to "good", "bad", and "better" are included in this thesis because they have been used in a particular citation or quotation and are made without intent to make a moral or values judgment.

Chapter 3 presents a general outline of the regulatory theory employed as a lens or framework through which to study Part 3. Although theorists highlight

²¹ Parker and Braithwaite, above n 14, 127.

²² Freiberg, above n 14, 4 citing Julia Black, 'Critical reflections on regulation' above n 18.

²³ Australian Government Guide to Regulation
<https://www.cuttingredtape.gov.au/sites/default/files/files/Australian_Government_Guide_to_Regulation.pdf> 3.

²⁴ John Braithwaite, Cary Coglianese and David Levi-Faur, 'Can regulation and governance make a difference?' (2007) 1 *Regulation and Governance* 1,4.

elements of what is effective regulation, this thesis uses those elements as a structure for its examination of Part 3, rather than as a set of criteria against which to assess Part 3. Effective regulation achieves its policy goal and chapter 3 presents a summary of the development of planning regulation in Australia and in Tasmania. The chapter highlights the public interest considerations that underpin the regulation and that this thesis employs to study the effectiveness of Part 3.

B. *Empirical and Doctrinal Research*

The aim of this thesis is to reflect and to be relevant to the world in which Part 3 is applied and to ensure that its research has ‘a practical point’.²⁵ In pursuit of that goal, this thesis combines doctrinal and empirical research. Doctrinal analysis is employed to identify the law as represented by Part 3 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* as part of Tasmania’s planning system, and to reach a conclusion as to what that ‘law is and the inconsistencies it contains.’²⁶ Conscious that ‘doctrinal scholarship in a vacuum loses much of its value,’²⁷ this thesis also turns to empirical research. Empirical research ‘has the potential to generate unique insights into law’²⁸ by enabling an appreciation of how law identified through doctrinal research and analysis and ‘learned in books is understood and applied in practice.’²⁹ In pursuit of those insights, semi-structured interviews were conducted with Tasmanians who work on a daily basis with Part 3 and who are involved in applying it to development assessment in Tasmania.

The author sent invitations through professional and industry bodies whose members are routinely involved in the application of and compliance with Part 3. A copy of the invitation letter is Annexure A to this thesis. Those willing to be interviewed responded by email with the responses saved to the secure

²⁵ Martin Dixon, ‘A doctrinal approach to property law scholarship: Who cares and why?’ (2014) 3 *Property Law Review*, 160

²⁶ Ibid, 160.

²⁷ Ibid, 165.

²⁸ Lisa Whitehouse and Susan Bright, ‘The empirical approach to research in property law’ (2014) 3 *Property Law Review*, 176.

²⁹ Ibid, 177.

computer network of the University of Tasmania. The organisations chosen were the Law Society of Tasmania, the Surveying and Spatial Sciences Institute (Tasmanian Division) and the Local Government Association of Tasmania. A consultant experienced in the cadastral system and with the implementation of development proposals was invited as one known to the author and referred to by several interviewees as familiar with not only Part 3, but also the legislation that preceded it, the *Local Government Act 1962*. An invitation was sent to the Recorder of Titles and through a personal contact of the author to the Planning Institute. Some of the initial interviewees who responded to the invitation letter suggested others in their field to whom a copy of the invitation letter was sent or who attended interviews with the original respondent.

There were fifteen respondents and the author travelled to interview them at locations in North-West Tasmania, Launceston and Hobart. The interviews were conducted over a period of four weeks in September and October 2016. Interviews ranged from 40 minutes to 90 minutes with the average being 50 minutes long. Of the fifteen people interviewed, six were local government employees, four were state service employees, three were lawyers, one a self-employed cadastral/development consultant and one a surveyor in private practice. All but one interviewee had at least sixteen years of experience with Tasmania's subdivision regulation with the majority having 20-30 years experience and in the case of two interviewees, 40 plus years.

The author made handwritten notes during the interviews that were reviewed and transcribed and sent within 2-3 days of each interview to the interviewee with a request that they be checked and amended as the interviewee thought fit, in order to correct errors and to accurately record the interviewee's intent. Responses were received from all of the respondents and amendments were made as requested. A summary of the main issues raised and of the interview process was sent by email to interviewees in late March 2017. The interviewees are referred to in this thesis by occupation and a number, with footnotes to the date of the interview. In the interests of anonymity the place of the interview is not included in the reference.

Common themes emerged during the interviews and were shared by those on the developers' side of the fence, those on the assessment side and those charged with implementing subdivision proposals. Those concerns focused on the difficulty of the language, the existence of redundant provisions and the impracticality and expense of some of the procedures established under Part 3. The interviewees were of the unanimous opinion that review of Part 3 is overdue, with variation in emphasis as to the problems reflecting the different roles played by a particular interviewee in the planning assessment and development system.

Those engaged in local government also identified the importance of Part 3 provisions to the function of the local government system. They expressed concern that its importance is poorly understood and emphasised the need for that to be taken into account and for consultation with them during any review.

The interview letter referred to broad underlying policy questions that are referred to in the section of this chapter entitled 'Limits to this Thesis.' Given that the invitations were sent to groups, the members of which are familiar with and regularly work with Part 3, the questions were deliberately broad. The author's hope was that the outline of regulatory theory and broad questions would provide a starting point from which interviewees would respond and volunteer information and comments as to their own experience in working with Part 3. That proved to be the case. The concerns highlighted in the invitation letters were relegated to the sidelines during all of the interviews. The majority of interviewees quickly expressed their frustration and concern with the development system and the place of Part 3 in it. These 'representative accounts of how [Part 3] operates in practice',³⁰ informed the doctrinal research.

The invitation letter highlighted the question of the relationship between Part 3 and the land registration system and interviewees responded to that question and spoke of their common difficulty with particular provisions. Their comments on the provisions covering Adhesion Orders, road titles and covenants led the

³⁰ Ibid, 177.

author to conduct the doctrinal research that is reported in chapter 6. The public open space provisions of Part 3 were not identified as a separate topic in the invitation letters. However several of the interviewees engaged in preparing subdivision proposals and in assessing them, quickly identified the public open space provisions as a significant problem. This led the author to research this aspect of planning regulation in Tasmania. The common issues raised by the interviewees form the structure and focus for the review of Part 3 that follows in Chapter 5.

The inclusion of leases within subdivision is a common provision of planning systems in Australia, New Zealand and also in some Canadian jurisdictions. Posing the question “does it work?” to the lease as subdivision provisions highlights the issues theorists have identified as they have considered what is effective regulation and how it may fail to be so. In Tasmania the issues are compounded, as the scope of leases that fall within the definition is unclear. The lease as subdivision provisions that were referred to in the invitation letter were not identified as significant problems by many of the Interviewees. That result perhaps reflects that surveyors and local government planners (rather than lawyers required to advise on the provisions) made up the majority of interviewees. The research and analysis into the lease as subdivision provisions (presented in chapter 7) is consequently the result of largely doctrinal rather than empirical research.

In a bid to make an ‘arguably correct and complete statement of the law, on the matter in hand’³¹ the doctrinal research of this thesis refers to judgments of the Supreme Court and decisions of the Resource Management and Appeal Tribunal (*RMPAT*) and the case law and legislation of other Australian and international jurisdictions where relevant and as comparison.

³¹ Terry Hutchinson ‘Doctrinal Research: Researching the jury’ in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Taylor and Francis 2013) 7, 10.

C Limits of this thesis

This thesis seeks to review Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) and to answer the question whether it is effective regulation for subdivision in Tasmania. The review highlights the complexity of Tasmania's planning system and the role that Part 3 plays in it. Some of those interviewed for this thesis emphasised the importance of meaningful consultation with all stakeholders in a review of Part 3 and the value of their contributions to any proposal to reform or replace Part 3. This thesis accordingly does not attempt to provide a solution to what is a complex regulatory problem. The solution to the problems presented by Part 3 will require consultation with and the contributions of, all stakeholders concerned with subdivision in Tasmania.

Part 3 consists of nine divisions and forty-two sections. This study does not attempt to analyse each section and its primary aim is to anchor its review of Part 3 to the practical world in which Part 3 is applied. The provisions that have been chosen for review are those that were the subject of comment by the interviewees spoken to for this thesis.

This thesis does not address broader policy issues underlying Tasmania's planning and subdivision system. Such issues arise for all planning systems that enable the subdivision and development of land and raise the question of the appropriate values to be reflected in subdivision legislation. Planning systems must balance not only the demands of those concerned with efficient development on one hand and those concerned with protecting the environment on the other, but also the competing social, environmental, and economic impacts of a development.³²

There are other policy issues specific to Tasmania's planning system that are beyond the scope of this thesis to consider in any depth. Although these issues were flagged in the invitation letter sent to interviewees their responses proved they were primarily concerned with addressing issues relevant to their everyday

³² Productivity Commission, above n 2, Context to Report (Nick Sherry), III.

need to apply and work with the provisions of Part 3. Nevertheless such issues merit further research and study. Brief comment is made below on three of these issues being (a) the definition of 'subdivision' as 'development'; (b) the *Strata Titles Act 1988*; and (c) the distinction between 'Use' and 'Development'.

(a) Subdivision as development

'Development' is defined in Tasmania's planning legislation to include 'subdivision.'³³ This treatment of subdivision is consistent with definitions in other Australian jurisdictions, with the exception of Western Australia.³⁴ As development, subdivision must comply with a planning assessment process that applies to development proposals in general.

Provisions affecting development, such as timeframes for applications to be assessed, advertising, notification and consent requirements, appeal rights and stipulations as to amendment and the life of a permit will apply to subdivision as to other forms of development. The issues surrounding advertising and appeal rights, in particular, have attracted divergent views.³⁵

It may be that a system that did not include subdivision as 'development' as Tasmania's does, would allow design and implementation of a planning assessment and approvals process that acknowledges and is tailored to the specific challenges and requirements of subdivision.³⁶

³³ *Land Use Planning & Approvals Act 1993 (Tas)* s 3(1); consolidation of parcels of land is also included in the definition.

³⁴ *Planning & Development Act 2007 (ACT)* s 7; *Planning Act 1999 (NT)* s 3(1); *Environmental Planning & Assessment Act 1979 (NSW)* s 6.2; *Sustainable Planning Act 2005 (Qld)* s 7; *Planning Act 2016 (Qld)* Sch 2; *Development Act 1993 (SA)* s 4(1); *Planning, Development & Infrastructure Act 2016 (SA)* s 3; *Planning & Environment Act 1987 (Vic)* S 3(1)(d); *Planning & Development Act 2005 (WA)* s 4 does not include 'subdivision' as development but Div 2 of Part 10 provides for approval of subdivision and certain transactions.

³⁵ Contrast views of the Property Council of Australia, above n 2, 10; Local Government Association of Tasmania, above n 10, 12 and study by Madeleine Figg 'Protecting third party rights of appeal, protecting the environment: a Tasmanian case study' (2014) 31 *Environmental and Planning Law Journal* 210; 211-213.

³⁶ The Western Australian Planning Commission produces Model Subdivision Conditions with advice notes that provide a set of tested and agreed conditions that apply to subdivision and that are to be regulatory reviewed to reflect statutory and policy needs: Department of Planning (WA) and Western Australian Planning Commission *Model Subdivision Conditions Schedule 1-3* <<http://www.planning.wa.gov.au/Model-subdivision-conditions.asp>> (October 2017)

(b) *Strata Titles*

Division under the *Strata Titles Act 1998* is one of the Tasmanian exceptions to 'subdivide.'³⁷ Strata schemes consequently fall outside the definition of 'development.' The Act refers to approval of strata schemes by councils, not by the planning authorities established under *LUPAA*.³⁸ One practitioner has suggested the consequent exception under the land registration system and for planning assessment is a source of both confusion and poor results in planning and land registration.³⁹

The *Strata Titles Act 1998* was amended in 2006 by the addition of s 31AA to remove doubt that a council might refuse a strata proposal on the basis that it was, in fact, a subdivision.⁴⁰ Nevertheless as strata proposals are not classified as 'development,' they can offer greater flexibility. Some commentators on Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* have suggested it and the *Strata Titles Act 1998* should be repealed and replaced, with subdivision and strata titles provisions being absorbed into the *Land Use Planning & Approvals Act 1993* (Tas) and the *Land Titles Act 1980* (Tas).⁴¹

(c) *'Use' vs 'Development'*

Tasmania's planning legislation distinguishes between 'use' and 'development' of land.⁴² The distinction was made because the original definitions in s 3 *Land Use Planning & Approvals Act* carried the difficulty that prescriptive standards pertinent to development would apply to applications to use (as opposed to develop), land.⁴³ The distinction once made meant performance-based planning controls focused on results or outcomes rather than prescriptive rules, could

³⁷ By contrast South Australian legislation includes division under *Community Titles Act 1996* (SA) and *Strata Titles Act 1988* (SA) in 'division' of an allotment.

³⁸ *Land Use Planning and Approvals Act 1993* (Tas) s 3; *Strata Titles Act 1998* (Tas) s 30. Implications of this distinction are discussed further in Chapter 4.

³⁹ Tim Tierney Law Society of Tasmania, 'Strata Reform – what do we do well? What to review? What could be delivered?' Paper presented at Strata Community Australia (Tas) CHU Symposium, Launceston Tasmania, 12th February 2016.

⁴⁰ Tasmania, *Parliamentary Debates*, House of Assembly, 2 November 2006 (D Llewellyn).

⁴¹ Tierney, above n 39; Local Government Association of Tasmania, above n 10, 14.

⁴² *Land Use Planning & Approvals Act 1993* (Tas) s 3(1).

⁴³ Tasmania, *Parliamentary Debates*, House of Assembly, 24 October 1993, 4553-4, 4565-4566 (MJ Cleary).

apply to the use of land.⁴⁴ Development, on the other hand, was required to comply with 'narrow, prescriptive standards.'⁴⁵

The introduction of standardised interim planning schemes into Tasmania's system has brought less prescriptive standards than those set out in Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993*. The interim schemes enable subdivisions to follow a more streamlined process and a permitted pathway where the subdivision conforms to the standards. As part of the current planning reform agenda, Part 3 has been amended to enable subdivision proposals to be approved despite their not complying with its prescriptive standards.⁴⁶

Given the change in policy does the legislative distinction between use and development still contribute to an effective planning system for Tasmania? The distinction has presented difficulties in interpreting planning schemes that predated the 1995 amendments,⁴⁷ for the drafting of new schemes,⁴⁸ and for the Resource Management and Appeal Tribunal.⁴⁹ The Minister for Local Government has on occasion struggled to make the distinction.⁵⁰

D Structure

This thesis is divided into seven chapters, including this introductory chapter.

As background *Chapter 2* considers planning regulation and identifies some of the tensions to which it is subject. The chapter notes comment on the Tasmanian planning reforms. Part 3 is regulation for subdivision and *Chapter 2* considers the task set for subdivision regulation.

⁴⁴ Peter J May, 'Regulatory regimes and Accountability' (2007) 1 *Regulation and Governance* 8; 10.

⁴⁵ MJ Cleary, above n 43, 4554.

⁴⁶ *Land Use Planning & Approvals Amendment (Streamlining of Process) Act 2014* (Tas), s 53.

⁴⁷ *Griffin v Resource Management and Planning Appeal Tribunal* [2010] TASSC 8 (2 March 2010); *J West v Kentish Council* [1996] TASRMAT 81.

⁴⁸ Launceston Planning Scheme 1996 Policy Papers, 5.

⁴⁹ *Gibson v Resource Management and Planning Appeal Tribunal* [2011] TASSC 72 (22 December 2011) [50-55].

⁵⁰ Tasmania, *Parliamentary Debates*, House of Assembly, 29 October 1993, 6017 (MJ Cleary).

Chapter 3 presents an outline of the basic elements of regulatory theory. The theory is employed by this thesis as a background against which to study Part 3. The chapter notes the reasons for regulation and considers the policy underlying planning regulation and its historical development in Australia.

Chapter 4 provides some context and background to the study of Part 3 as planning regulation. As regulation that affects competition, efficiency is a particularly important attribute of planning regulation. The chapter notes the direct and indirect costs in terms of both time and money that proponents of development face under the typical planning assessment process in Australian jurisdictions. The efficiency of a planning system may also be affected if there is inconsistency or lack of cohesion among its component parts. As subdivision regulation must interact with the land registration system, the chapter notes the essential elements of the Torrens system and outlines Tasmania's planning system under the *Land Use Planning and Approvals Act 1993* (Tas) ('LUPAA') and the interaction between Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* and the LUPAA system. This thesis finds that there are implications for the efficiency and effectiveness of Tasmania's planning system as a result of that interaction.

Chapter 5 focuses on the issues raised by the interviewees spoken to for this thesis, and examines those issues against the background of theory as to effective regulation. Efficiency is an important characteristic of planning regulation, but effective regulation is also regulation that is recognised by the regulated as a viable means of achieving a policy goal. Such political acceptability is an attribute of effective regulation as it fosters a willingness to comply. *Chapter 5* examines the issues raised by interviewees including sections that contain redundant provisions, unclear language, or that establish cumbersome procedures. The chapter identifies provisions that are enactments of what is now redundant out-dated policy, and that also fail to interact effectively with the land registration system. Interviewees identified as causes of concern and frustration:

- the difficult language of s 110 that prevents it (in the absence of any other mechanism), being used as a cost-effective means of joining multiple blocks of land,
- the failure of ss 116 and 117 to achieve the establishment of adequate public open space,
- the ineffectiveness of s 95 as a means of addressing the issues raised by road titles; and
- the cumbersome procedure for the amendment of sealed subdivision plans through removal of redundant easements and covenants.

Chapter 6 examines the issues raised by the provisions pursuant to which the lease of part of a block of land will constitute a subdivision. The 'lease as subdivision' provisions are considered in a separate chapter as they demonstrate the complex interaction between land registration systems and planning assessment and control and how that interaction can be ineffective. The provisions are common to Australian legislation, including Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas). They highlight what theorists studied for this thesis have identified as the attributes of ineffective regulation. Compliance with the legislation exposes parties to leases to the costs and delay associated with planning assessment designed to cater for the subdivision of the fee simple. The associated difficulty encourages not only the development of strategies to avoid the effect or application of the legislation, but also the possibility of the legislation being used by one party to a lease as a means of achieving a windfall gain. In Tasmania the difficulties presented by the lease as subdivision provisions are compounded as the wording of the definition of subdivide in s 80 of Part 3 is unclear and it is impossible to state with certainty what leases are caught within its scope.

Chapter 7 presents the conclusions of this thesis and the proposition that Part 3 cannot be considered effective regulation for subdivision in Tasmania. Failure to review Part 3 means that the difficulties presented by unclear language, cumbersome procedures, and out-dated policy will be a continued source of delay, cost, and frustration. Its existence as a parallel system of assessment for

subdivision creates uncertainty. A review of Part 3 is long overdue. Such a review should take into account the views of all participants in Tasmania's planning process and is unlikely to be an easy process. This thesis nevertheless concludes that such a review is essential, despite the difficulties it will present. Unless the provisions of Part 3 and their place in the planning system are understood, considered and assessed, the current planning reforms are unlikely to achieve their stated goal. That is because a key component of Tasmania's planning regulation (its subdivision legislation) is ineffective and inefficient.

CHAPTER 2 – BACKGROUND AND CONTEXT

I THE TENSIONS UNDERLYING PLANNING REGULATION

One of the tasks facing policy makers working to establish and reform planning systems, is to balance the push for streamlining and efficiency and the importance of transparency and public engagement in the planning process.⁵¹ The difficulty of attaining balance is heightened given the complexity of the issues to be regulated. Planning regulation is viewed by some as a ‘...questionable intrusion into the rights of people to determine the best use of land for their own purposes...’⁵² Personal property rights can come into conflict with the policy underpinning planning regulation. The potential for such conflict is heightened by the scale of the financial gains and losses that are at stake in the development of land. In Australia’s federation, planning regulation and control is a state and territory responsibility.⁵³ Under state laws, there is no compensation for invasion of ‘private proprietary interests or for capital loss incurred when land is devalued because development cannot proceed.’⁵⁴

The issues to be regulated by planning systems include the resolution of land use conflicts. Such conflicts include those that arise from the subdivision of rural land for residential development that can result in the loss of a valuable agricultural resource.⁵⁵ The significance of that conflict is demonstrated by Tasmania’s position as the only Australian jurisdiction to have ‘right-to-farm’ legislation. The *Primary Industry Activities Protection Act 1995* (Tas) is designed to protect farmers against civil action in nuisance by landowners seeking a

⁵¹ Productivity Commission of Australia, above n 2, Volume 1, XV 111.

⁵² KA Palmer, *Planning and Development Law in New Zealand Volume I*, (The Law Book Co Ltd, 1984) 6.

⁵³ The significance of this was highlighted by the Australian Law Reform Commission in *Traditional Rights and Freedoms*, Final Report No 129 (2015) 522 [20.4], 525 [20.18].

⁵⁴ A.S Fogg, *Australian Town Planning Law Uniformity and Change* (University of Queensland Press 1982) 90, 112; also submission by Australian Property Institute to Australian Law Reform commission noting lack of compensation as ‘an established feature of Australian real property’; above n 53, 555, [20.133].

⁵⁵ GLL Davis, ‘Rural Subdivision: policies and practice’ (1981) 19(4) *Royal Australian Planning Institute Journal* 132. See also Geoff Anstey ‘Considering the right to have a house on rural allotments’ (2006) 43(2) *Australian Planner*, 20.

lifestyle that might be disturbed by noisy machinery, pesticide sprays, and livestock.⁵⁶

Another problem for planning control is the appropriate form of urban development. Planners are grappling with the choice between urban consolidation and residential densification on the one hand, and urban sprawl and the subdivision of green-field sites on the other.⁵⁷ Planning and land use and development policy will have even bigger roles to play in the future as climate change takes effect. Climate change poses difficult and increasingly pressing questions. Those questions include how, or if, land close to the coast is to be developed. Such questions are especially challenging for Australia, which is vulnerable to ‘...climate change induced coastal hazards... exacerbated by the fact the vast majority of the population lives close to the coast.’⁵⁸

As the task of development control becomes more complex, planning tools such as zoning mean that local government authorities will play an increasingly important role.⁵⁹ Local governments play a pivotal role in implementing planning policy through their enforcement of planning controls and assessment of development proposals. McLeod argues that their task in the planning system is important because they are not specialist environmental agencies focused on environmental law.⁶⁰ They are instead focused on ensuring that land use and development proposals are consistent with a long-term strategic and statutory

⁵⁶ The complexity of the task such regulation faces is highlighted in a submission by the Environmental Defenders Office (Tas) Inc; Submission No 10 to the Department of Primary Industries, Parks Water and the Environment *Review of the Primary Industry Activities Protection Act 1995*, 4 August 2014, ‘Case Study’ 5.

⁵⁷ Luke McGregor and Andrew H Kelly ‘Ku-ring-gai, New South Wales: a battleground between urban consolidation and green amenity’ (2015) 32 *Environmental and Planning Law Journal* 562, 567. Recent South Australian planning reform had as one of its goals, a reduction in urban sprawl and the encouragement of in-fill development within the existing urban footprint South Australian Government ‘Planning Reform – a Driver of Economic Growth’ Policy Paper Feb 2014; 2.

⁵⁸ Brian J Preston, Book Review – *Climate Change and Coastal Development Law in Australia* (2015) 32 *Environmental and Planning Law Journal* 294, 295.

⁵⁹ Glen McLeod, ‘Reconciling Planning and Environmental Law and Policy’ (2015) 20 *Local Government Law Journal* 41, 45.

⁶⁰ *Ibid*, 44-45.

planning framework that is designed to apply the principles of the *National Strategy for Ecologically Sustainable Development*.⁶¹

The tension between the public interest and private property rights means that development assessment processes are under regular review. The economic advantages of streamlined development assessment were noted in 1997 by the Organisation for Economic Co-Operation and Development (OECD) when it referred to the importance of good regulatory design to reduce the burden on business.⁶² In more recent decades the demand for planning reforms to deliver productivity dividends to the Australian economy has been a consistent theme.⁶³

In 2011, the Productivity Commission identified key reform points including:

- removal of competition restrictions,
- attention to business costs incurred in the assessment process,
- timely and consistent decisions by councils,
- broad and simple land use controls to reduce red tape; and
- a greater role for the market in determining uses.⁶⁴

Simplifying and speeding-up planning assessment and facilitating approvals has been the focus of ongoing planning reform in Australia for some decades.⁶⁵ Common themes of such reform are the need for simplified procedures and clear language. Proponents of development also argue that the number of approvals should be minimised and that regulation should be focused on outcomes rather than prescriptive conformity. Those who argue against development push the need for transparency and public consultation.⁶⁶

⁶¹ Chapter 3 traces the development of Australian planning regulation as a means of implementing changing policy to protect the public interest in sustainable development.

⁶² Organisation for Economic Co-Operation and Development, *Regulatory Impact Analysis: Best Practices in OECD Countries*. Report (1997) 3.

⁶³ Property Council of Australia, above n 2, 11.

⁶⁴ Productivity Commission of Australia, above n 2, Volume 1, XVIII.

⁶⁵ Productivity Commission of Australia, above n 2 [3.4]; Property Council of Australia, above n 2, Ch 2; Gurran Austin and Whitehead, above n 2; Philippa England, above n 2, 61-62 citing Australian Government, 'Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business' (31 January 2006) 'The Banks Report'.

⁶⁶ England, above n 2, 62.

In reforming planning systems, designers of such systems must balance streamlining and efficiency against transparency and public engagement in the planning process.⁶⁷ The Productivity Commission has noted that community opinion is that governments have considerable scope for improvement in the area of community engagement.⁶⁸

Adequate resourcing and time for review are required for the reform of a system as complex as a planning system. There is a danger that in proceeding with reform and review to only part of a planning system, the functioning and cohesiveness of the system will be weakened. The Productivity Commission has urged caution in the process of ongoing reform that is characteristic of Australia's development assessment systems.⁶⁹ The Commission has pointed out that the performance of planning systems will be affected as 'rolling reforms' take place and reforms are replaced by further reforms without full implementation or evaluation.⁷⁰ The ability of planning authorities to make consistent and timely decisions may be affected by rushed reform to the regulatory environment in which they operate, as coherence is an important quality of the planning regulatory environment.⁷¹

II PLANNING REFORM IN TASMANIA

The Property Council of Australia has noted as one of the negative attributes of its planning system Tasmania's 'inability to introduce 'state-based planning policies that adopt an economic focus as opposed to a single-issue approach.'⁷² In considering the proposed planning reforms, Castles and Stratford refer to the 'paradox that is Tasmania,' a relatively small population that is characterised by "internal heterogeneity confounded by tensions".⁷³ They note that, Tasmania

⁶⁷ Productivity Commission of Australia, above n 2, Volume 1 XXIII;

⁶⁸ Ibid, XXXVIII.

⁶⁹ Ibid, Volume 1 XXII.

⁷⁰ Ibid, X11.

⁷¹ Ibid, XVIII.

⁷² Property Council of Australia, above n 2, 76.

⁷³ Angela Castles and Elaine Stratford, 'Planning reform in Australia's island-state' (2014) 51(2) *Australian Planner*, 170, 171. The quote at footnote 77 below develops the concept of internal heterogeneity.

seems to be unable to produce a planning system that either the proponents of development or those opposing development are satisfied with.⁷⁴

One of the reasons for why this is the case, is that in Tasmania elected members are close to the members of their electorate. That situation has not been unrecognised by Tasmania's Members of Parliament, as illustrated during Parliamentary debate in 1993. In 1993 substantial reform of Tasmania's planning and local government system saw the introduction of several pieces of legislation including the State Policies and Projects Bill 1993. During debate on the Bill, one member remarked, '...we are being driven by the lowest common denominator, and by that I mean the Upper House...dealing with matters on a purely parochial basis, especially at [Legislative] Council election times.'⁷⁵

Commentators on the proposed Tasmanian reforms have pointed out that there is a danger that the reforms may be focused on 'election commitments and project outcomes' rather than sound planning policy.⁷⁶ Castles and Stratford suggest that the influence of local issues on policy is inherent in the Tasmanian political and social landscape that consists of:

[L]ocal governments...overlaid by a multitude of small towns, villages and settlements each with its own history and expectations; each drawing on specific and sometimes contentiously accessed or produced resources; each with particular economic and demographic outlooks – and planning challenges.⁷⁷

The complexity inherent in the reform of planning regulation generally and the hurdles facing reform in Tasmania are reflected in the response of the Local Government Association of Tasmania to the proposal to facilitate the

⁷⁴ Ibid.

⁷⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 4 May 2004 (Peter Patmore).

⁷⁶ Planning Institute of Australia, (Tasmania), Submission No 224 on *Tasmanian Planning Scheme – Draft State Planning Provisions*, 18th May 2016, 2.

⁷⁷ Castles and Stratford, above n 73, 171 citing A. Harwood, *The Political Constitution of Islandness: The 'Tasmanian Problem' and Ten days on the Island* (PhD Thesis, University of Tasmania, 2011).

introduction of a single state-wide planning scheme. The Association urged caution, the need for adequate resources, time and consultation.⁷⁸ It highlighted the risks of rushing major reform, commenting on the need for ‘orderly, strategic and beneficial review and change...rather than a more ad-hoc approach that can produce unintended consequences.’⁷⁹

Other commentators have highlighted that the introduction and replacement of planning schemes without a coherent system of establishing the status of permits, applications and appeals causes difficulties.⁸⁰ Public confidence in a system is affected if change is rushed. Change made without adequate research, advice, and consultation can result in delays and uncertainty.⁸¹ In response to the draft State-Wide Planning Provisions, the Tasmanian Division of the Planning Institute of Australia urged the need for review of underlying policy and a clear strategic direction for planning and development.⁸² That such review is to take place after the introduction of the planning scheme that will be its primary implementation tool, risks putting the ‘cart before the horse.’⁸³

The Property Council of Australia, although welcoming the Government’s commitment to reform and the new planning scheme, noted that structural reform of the local government sector would be necessary to ‘reap the full benefit.’⁸⁴ Other commentators have highlighted the need for solid legal and policy frameworks to be in place before reform is enacted.⁸⁵

⁷⁸ Local Government Association of Tasmania, above n 10, 1.

⁷⁹ Ibid.

⁸⁰ The Resource Management and Planning Appeal Tribunal (Tasmania), Annual Report (2013-2014), 6, reference in note 2 to *Northern Midlands Council v Telstra Corporation Ltd* [2014] TASSC 54 (15 October 2014).

⁸¹ Angela Castles and Elaine Stratford, above n 73, 175.

⁸² Planning Institute of Australia (Tasmania), above n 76, 2.

⁸³ Ibid.

⁸⁴ Property Council of Australia Submission No 265 on *Tasmanian Planning Scheme – draft State Planning Provisions*, 18th May 2016.

⁸⁵ Castles and Stratford, above n 73, 17.

III THE TASK OF SUBDIVISION REGULATION

Planning regulation is subject to constant pressure for review and reform and must address complex issues. As part of a planning system, subdivision regulation is subject to that same pressure and complexity. The task it faces is further complicated. Unlike other forms of planning regulation such as zoning and development control, subdivision regulation is tied to the creation of new interests in land.⁸⁶ Subdivision regulation must therefore interact not only with the broader spectrum of planning regulation such as planning schemes, but also with the land registration system. Section 17A of the *Land Titles Act 1980* (Tas) requires that land not registered under the Torrens system be converted to that system before subdivision can take place. The interaction with the Torrens system adds complexity to the task that subdivision regulation faces. This part aims to introduce subdivision control, the role it plays in a planning system and the interaction between subdivision regulation and the Torrens land registration system.

One of the key tasks for planning regulation is the implementation of policy for the subdivision of land. That task is performed by a system to assess proposals to create new interests in land and the creation of those interests. In 2014, the Local Government Association of Tasmania noted the wider issues that system must address, including:

- services and access;
- dedication of land for public open space;
- road widening;
- deviation of roads;
- drainage;
- security for works to be performed by a developer;
- provision for easements; and
- preparation of title documents.⁸⁷

⁸⁶ Stanley M Makuch, Neil Craik & Signe B. Leisk *Canadian Municipal and Planning Law* 2nd ed (Toronto: Thomson Carswell 2004) 224-225.

⁸⁷ Local Government Association of Tasmania, above n 10, 14.

The task of subdivision regulation is to promote the public interest in sustainable management of land and resources. Kirby J has summed up that purpose:

In order to understand the development of planning law...it is necessary to appreciate that it is concerned with fundamentally more important objectives than the rights of those with various interests in land inter se. Of their nature, such laws, governing consent to development generally, and to subdivisions in particular, are concerned with the orderly management of land in society so as to protect at once the interests of individuals, the community and the environment.⁸⁸

In Tasmania the task of assessing subdivision proposals is assigned to local government. The central role of councils in planning assessment has been acknowledged for decades and in 1951 prompted Every-Burns to consider the question as to whether the public interest is a separate head of power and reason in itself for disapproval of a development.⁸⁹ Every-Burns concluded that rather than councils being competent to refuse an application within the variable range of their own conception of what is in the public interest, councils are in fact entrusted with various powers that are to be exercised having regard to the public interest.⁹⁰

The first example of Australian policymakers taking a deliberate decision to use the land registration system to enforce subdivision control in the public interest was the decision made by the Queensland Parliament of 1885. The *Undue Subdivision Prevention Act 1885* (Qld) was to be a means of addressing sanitation and health problems arising from the division of land into small parcels, including by the granting of long-term leases.⁹¹ The subheading to the Act notes that it was:

⁸⁸ *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472, 496 [71].

⁸⁹ JW Every-Burns, 'Buildings and Subdivisions – Disapproval for Reasons of Public Interest' (1951) 24 *Australian Law Journal* 346.

⁹⁰ *Ibid*, 348-349.

⁹¹ Queensland, *Parliamentary Debates*, House of Assembly, 29 September 1885, 850 (J Ferguson) and 13 October 1885, 1029 (S Griffiths); see also Antra Hood, 'Reconfiguring Subdivision in

An Act to make provision for regulating the width of streets and lanes and to prevent the Subdivision of Land in such a manner as to be injurious to the Public Health.

Section 8 of the Act required that lots on a plan of subdivision lodged with the Registrar of Titles be not less than 16 perches (404.68 m²). There were certain exceptions including a lease for a term of fewer than ten years.

Today, subdivision control is still used as a means of 'preventing deleterious development.'⁹² Once a subdivision plan has been certified or approved by a council, it will be lodged with the land registration authority to be registered on title records to the affected land. It is long established that it is not the role of the Registrar or Recorder of Titles when presented with a subdivision plan approved by a council to make a decision on the 'wisdom or desirability of the proposed subdivision.'⁹³ The council's decision is nevertheless enforced through the land registration system.

In Tasmania subdivision plans that have been approved by a council are to be sealed by a council and the Recorder of Titles is not to register subdivision plans that a council has refused to seal.⁹⁴ Similarly, in other Australian jurisdictions and in New Zealand, land administration authorities cannot register subdivision plans that do not have the consent or approval of planning authorities.⁹⁵ The land registration system is thus used to enforce planning control, as subdivision

Queensland: the Integrated Planning Act 1997' (1998) 15(2) *Environmental and Planning Law Journal* 84, 96.

⁹² Leslie A Stein, *Urban Legal Problems* (The Law Book Co Ltd 1974) 74-75, note 3.

⁹³ Anon 'The Conveyancer: Subdivision Plans – Duty of Registrar of Titles' (1929-1930) 3 *Australian Law Journal* 51.

⁹⁴ *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) s 89(3).

⁹⁵ *Land Title Act* (NT) s 52(2), s 66(2); *Land Title Act 1994* (Qld) s 50(1)(h); *Real Property Act 1886* (SA) s 223LD; *Subdivision Act 1988* (Vic); *Planning & Development Act 2005* (WA) s 147; *Resource Management Act 1991* (NZ) s 226. In NSW Registrar General may reject a transaction not shown on a current plan as defined *Conveyancing Act 1919* (NSW) s 23F(2).

plans must be certified as compliant with the planning assessment system in order to be registered and for new titles to issue.⁹⁶

Nevertheless, the degree to which subdivision regulation is a successful means of controlling land use and development has been questioned. In 1974 Stein queried whether the original purpose of subdivision control has been lost and replaced with 'complex control devices' that go much further than preventing abuse of the process of dividing land and constructing buildings.⁹⁷

In a review of Tasmania's planning system in 1981, Mant commented that subdivision control is a 'blunt instrument' that does not compare to more flexible means of controlling land use.⁹⁸ He referred to those alternatives as including design and siting controls, pricing policies, and tree preservation orders. Mant proposed that subdivision controls might restrict innovation in the design and siting of housing. In the case of rural land particularly, they may be an ineffective way to achieve policy objectives.

Canadian commentators have also noted that the technique of imposing land use control through the land registration system is ingrained.⁹⁹ They propose that it is consequently unlikely to be abolished, despite the resultant inflexibility, complexity, and the development of techniques to circumvent the controls. Such comments are also applicable to control of land use and development in Australia, including in Tasmania.

The case of agreements made and registered on title records under Part 5 of the *Land Use Planning and Approvals Act 1993* (Tas) highlights one of the issues that

⁹⁶ *Conveyancing Act 1919* (NSW) s 195C; *Land Title Act* (NT) ss 51 & 52; *Land Title Act 1994* (Qld) s 50; *Real Property Act 1886* (SA) s 223 LD; *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) ss 87 & 88; *Subdivision Act 1988* (Vic) S 5; *Planning & Development Act 2005* (WA) s 146 and *Transfer of Land Act 1893* (WA) s 166.

⁹⁷ Stein, above n 92, 75.

⁹⁸ John H Mant, 'Land Use Management Administrative Review' Report for the Tasmanian Government June 1981; 34.

⁹⁹ Stanley .M. Makuch, Neil Craik & Signe B Leisk above n 86, 224-225. The authors refer to the various techniques employed to avoid the effect of Canadian subdivision legislation; chapter 6 of this thesis highlights techniques employed to avoid the results of legislative inclusion of leases as subdivisions.

arise when subdivision control is enforced through the land registration system. Part 5 provides for agreements between a planning authority and a landowner that can be registered on title to land.¹⁰⁰ Once registered, the covenants in the agreements are to run with the land as if they were covenants to which s 102(2) of the *Land Titles Act 1980* (Tas) applies. The burden of the covenants consequently passes with the land.

Such agreements offer a relatively flexible approach to subdivision control. Controls can be tailored to a particular development by combining planning regulation with the land registration system. Nevertheless as the agreements carry forward from a parent title to subsequently subdivided lots, failure to review and remove them can result in redundant, irrelevant instruments remaining registered on title records. Bell has referred to the continued registration of redundant instruments as the ‘cluttering’ of the land titles register.¹⁰¹ She notes that such cluttering is one problem that arises from the use of Australian land registration systems as a means of environmental management and sustainable decision-making.¹⁰² Cluttering implies inefficiency and as noted in the following chapter, efficiency is a key characteristic of effective regulation.

Planning and development regulation is a system of controlling the use and development of land with the aim of protecting the public interest in the sustainable and orderly development of land and managing the expectations of competing stakeholders. This chapter has outlined some of the tensions underlying planning regulation as a system designed to meet those policy goals and has also noted the particularly difficult task facing subdivision regulation as it interacts with the land registration system. Chapter 3 outlines regulatory theory that is used as a framework to consider the effectiveness of Part 3 with that framework underpinning the consideration of particular provisions of Part 3 that form the content of chapters 4-6.

¹⁰⁰ *Land Use Planning and Approvals Act 1993* (Tas) ss 78, 79.

¹⁰¹ J. Bell ‘Greening the land title register – How can the land title register assist with sustainable decision-making?’ (2010) 18 *Australian Property Law Journal* 263.

¹⁰² *Ibid.*

CHAPTER 3 THEORY AS TO EFFECTIVE REGULATION AND THE POLICY UNDERPINNING PLANNING REGULATION

This thesis turns to the work of regulatory theorists for guidance as to the questions to ask and the issues to consider in studying the effectiveness of regulation. That work forms the framework and structure for the analysis of Part 3 that follows and that is employed in the following chapters, as a lens through which to examine Part 3.

I REGULATORY THEORY AS TO EFFECTIVE REGULATION

Regulatory theorists have considered how to assess whether regulation works and is effective and why it works or fails to be effective. Theorists have identified the elements that make up effective and ineffective regulation. As will be evident from this outline of the work of regulatory theorists, the elements of effective regulation will frequently co-exist, interact, and be interdependent. Accordingly regulation may be ineffective because it is not a cost-effective means of achieving a policy goal. Regulation may not be cost-effective because its meaning is unclear or it has unintended consequences. The regulated may reject such regulation out of frustration and so feel justified in not complying with it.

Although theorists highlight elements of what is effective regulation, this thesis uses those elements as a structure for the examination of Part 3 and as a guide to the relevant questions to ask and issues to consider. The identified elements of effective regulation are applied in that way rather than as a set of criteria against which to assess Part 3.

A *The Reasons why we regulate*

In evaluating regulation, Diver refers to how well a rule performs in 'effecting its purpose.'¹⁰³ The purposes underlying regulation may vary. Regulation, such as planning regulation, may be introduced to protect the community, to advance

¹⁰³ Colin Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 *The Yale Law Journal* 65, 67.

‘the common good’ or in the ‘public interest.’¹⁰⁴ Such regulation is a reflection of community values. The regulation enables their expression and institutionalisation and is a means by which policy decisions are put into effect.¹⁰⁵

Regulation may be enacted to manage risk. Workplace health and safety regulation is an example. Regulation may also be introduced to promote the interests of certain individuals or groups at the expense of the community. Private interest and capture theories explain how such regulation can be enacted and take effect, often at a net social loss.¹⁰⁶

Regulation may be a response to failure by the market ‘to deliver socially beneficial results.’¹⁰⁷ Market forces may fail to take account of the public interest in the way in which resources such as land are used and developed.¹⁰⁸ Regulation may also be the most effective way to pursue social goals.¹⁰⁹ Regulation such as planning regulation also plays a ‘vital facilitative role’¹¹⁰ by providing a structure backed by the coercive force of sanctions that enables orderly transactions and social interaction.¹¹¹ Regulation may however fail to perform effectively the task assigned to it; identifying that task is key to assessing the effectiveness of the regulation.

¹⁰⁴ Arie Freiberg, above n 14, 5 citing I McLean ‘The history of regulation in the United Kingdom: Three case studies in search of a theory’ in J Jordana and D Levi-Faur (eds) *The Politics of Regulation: Institutions and regulatory reform for the age of governance* (Edward Elgar 2004) 45; and G Hodge ‘Evaluating what will work in nanotechnology regulation: in pursuit of the public interest’ in G Hodge, D Bowman and K Ludlow (eds) *New Global Frontiers in regulation: the age of nanotechnology* (Edward Elgar 2007) 113.

¹⁰⁵ Morgan and Yeung, above n 14, 147, [3.4].

¹⁰⁶ Ibid, 43, [2.3].

¹⁰⁷ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) [3.28] citing R Baldwin and M Cave, *Understanding Regulation: Theory, strategy and practice* (Oxford University Press, 1999) 1-17.

¹⁰⁸ *Living on the Coast the Cradle Coast Regional Land Use Planning framework* http://www.planning.tas.gov.au/_data/assets/pdf/0011/332984/Living_on_the_Coast-declared_27Oct2011.pdf; 10.

¹⁰⁹ Australian Law Reform Commission, above n 107 [3.28].

¹¹⁰ Morgan and Yeung, above n 14, 91 [3.2].

¹¹¹ Ibid 147 [3.4].

B *The policy underpinning planning regulation in Australia*

Part 3 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* is planning regulation. The task assigned to planning regulation is that of providing a solution to the problem of incompatible uses and a reason for increasing government legislation governing land use, the environment and conservation.¹¹² The development of planning regulation in Australia highlights the public interest considerations that underpin planning systems. Australia has been named as one of the 'frontier' nations of the Anglo-Saxon world, the other two being the United States of America and Canada.¹¹³ Mant and Nielson refer to the idea that development rights came from the land itself, as if they were crops, and note the movement in English law from the feudal system to the development of fee simple rights to land.¹¹⁴

In Australia, estates in fee simple replaced early grants of leases and licences.¹¹⁵ These unrestricted rights to enjoy land were a means of encouraging colonists to occupy the vast tracts of undeveloped land, at the expense of the indigenous population. The mentality that land was a frontier to be developed fostered the idea of land as a profit-making resource. Wakefield's model of systematic colonisation was designed to control the release of land to those seeking such 'super-profits' in order to ensure the required workforce was retained.¹¹⁶

The encouragement to develop land and to reap profits meant there was little effective planning control. Dawkins has suggested that in Australia desire to exert control over the use and development of land was a significant factor in the 1808 coup known as the Rum Rebellion.¹¹⁷ He argues that the military officers

¹¹² John H. Mant and Lyndsay Nielson, 'Land Uses in Australia' (1975) 47(4) *The Australian Quarterly* 20, 23.

¹¹³ *Ibid.*, 22.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ AWP Whimpress, '*The Wakefield Model of Systematic Colonisation in South Australia: an examination with particular reference to its economic aspects*,' (Ph D Thesis, School of Natural and Built Environments University of South Australia 2008), 55 citing EG Wakefield (1841) Parliamentary Select Committee Enquiry Q2623.

¹¹⁷ Jeremy Dawkins, 'The role of discretion in the history of development control' (1985) 16 *Western Australian Law Review* 295, 296-297.

involved sought to resist Governor Bligh's attempts to recover land they had expropriated in defiance of planning principles Governor Arthur Phillip had earlier put in place for the development of Sydney.

Despite such resistance, policymakers increasingly looked to control the development of land as 'the ultimate example of a finite resource.'¹¹⁸ As planning regulatory systems were established the early 'laissez-faire' approach to controlling land use and development was substantially modified.¹¹⁹ Australian Parliamentary debate of the late 19th and early 20th centuries reflects this change at a time when the urban population was growing and planning systems were in their infancy. Legislators were concerned with controlling slums, building standards, lot sizes, and the presence of blacksmiths and piggeries in residential areas.¹²⁰ Members of Parliament expressed the need 'to rear a desirable class of Australians.'¹²¹ Those desirable Australians required 'pure air to breathe' free from congestion.¹²²

Stein refers to the argument that subdivision control in Australia was the historical result of the need to direct the intense subdivision of land in its capital cities.¹²³ Such control was an attempt to ensure that developers did not shirk their responsibility to provide and pay for infrastructure as land was developed. That infrastructure included roads, drainage, sewerage, and water supply. Municipal and planning authorities were given the responsibility of overseeing and controlling development and of ensuring that minimum standards applied to

¹¹⁸ Mant and Nielson, above n 112, 22.

¹¹⁹ AP Randerson, 'The exercise of discretionary powers under the *Resource Management Act 1991*' (1991) *New Zealand Recent Law Review* 444, 445; see also Mant and Nielson above n 112, 25-26.

¹²⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 1918, 2517 (BJ Doe); 24 October 1918, 2353 (AGF James); Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September & 13 October 1885, 848-853 & 1028-1030 (SW Griffith, E Palmer, J Macfarlane); Antra Hood, above n 91; 'Building Blocks in Hobart Area' *The Mercury* (Hobart), 19 November 1943, 42.

¹²¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 October 1918, 2498 (S Hickey).

¹²² *Ibid.*

¹²³ Stein, above n 92, 74-75, note 3.

land development. Those standards included regulations controlling the size of lots, the design and location of roads, and the construction of buildings.

An example of such regulation is the Local Government Bill 1919 (NSW). Parliamentary debate on the Bill records that it was intended to wipe out the practice of ‘cutting up a piece of land into pocket-handkerchief allotments.’¹²⁴ Councils were ‘...to be armed against the possibility of the resurrection of slum areas.’¹²⁵ Subdivision of land meant that without adequate registration records it was difficult to trace landowners and to collect rates and taxes,¹²⁶ providing additional incentive for government control.

In Tasmania legislation also assigned the task of controlling the development of land to local government. An early example of such legislation is Part VIII of the *Town Boards Act 1896* (Tas). This Part provided for by-laws to be made regulating sewerage and drainage, public and private streets, water supply, and the construction of buildings. Section 194 prohibited the laying out or disposal (with ‘disposal’ being undefined), of land for building purposes without a plan being first submitted to the Town Board. The prohibition was carried forward by s 199(9) of the *Local Government Act 1906* (Tas) and then s 48(1) of the *Towns Act 1934* (Tas).

Non-compliance with the legislation affected commercial agreements. Annotations to s 48 of the *Towns Act 1934* in Volume V of the Tasmanian Statutes refer to the effect of non-compliance with the section on contracts for the sale of land. The cases referred to are decisions of the High Court considering s 23 of the *Town Planning & Development Act 1920* (SA) that prohibited offering for sale, selling, conveying, transferring or otherwise disposing of land except in accordance with the Act.¹²⁷ Isaacs J considered the question whether the Act

¹²⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 1918, 2517 (BJ Doe).

¹²⁵ *Ibid.*

¹²⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September 1185, 850 (J Ferguson).

¹²⁷ *George v Greater Adelaide Land Development Co* (1929) 43 CLR 91, *Adelaide Development Co Pty Ltd v Pohlner* (1933) 49 CLR 25.

rendered a contract for the sale of land, as opposed to the transfer of land pursuant to that contract, void. In this case the parties had realised the Act had not been complied with but had determined that the provisions could be complied with after sale, but before conveyance. In considering that question Isaacs J turned to the purpose of the Act and noted that the Act's disclosed purpose was the promotion of public interests, convenience, and safety.¹²⁸ The High Court judgments reflect that purpose by holding non-compliant contracts void. It was not until 1947 that the *Hobart Corporations Act* included a savings provision in s 199(1) by which such contracts would be saved. The section deemed the inclusion of a condition into such agreements that they be subject to the granting of planning approval.

Hansard records did not exist in Tasmania until 1979 and the only records of Parliament's proceedings before that time are reports of Tasmanian Parliamentary debates written by unnamed journalists for the Hobart-based newspaper *The Mercury*. As noted in the following paragraphs, those reports show that the public interest in the development of land occupied the minds of Tasmanian Parliamentarians, with the content of their debate echoing the concerns of the New South Wales Parliament in 1918.

In 1943, Mr Soundy of the Tasmanian House of Assembly is reported as having referred to the 'persons in Hobart [who were] determined to perpetuate slums.'¹²⁹ The importance of protecting the public by controlling the subdivision of land exercised the minds of Tasmanian members in 1947 as they considered the Hobart Corporation Bill. A proposal to reduce the Council's minimum requirements for the sale of a lot on which two dwellings were situated was the subject of discussion, amendment, and counter-amendment between the House of Assembly and the Legislative Council. The Hobart Corporation itself was reluctant to reduce its standards and warned that if the change was made '...it would be the responsibility of the House for permitting undesirable

¹²⁸ *George v Greater Adelaide Land Development Co* (1929) 43 CLR 91, (Isaacs J) 101.

¹²⁹ 'Building Blocks in Hobart Area' *The Mercury* (Hobart), 19 November 1943, 42.

conditions.’¹³⁰ Members were concerned that reduction in the minimum frontage and area of a lot would encourage substandard houses and infectious disease.¹³¹

In 1962 the *Local Government Act* (Tas) was passed; its purpose was stated to be the consolidation and amendment of the law relating to local government. The various Corporations Acts were repealed.¹³² Division 2 of Part XVI of the *Local Government Act 1962* (Tas) dealt with not only subdivision but also building, which meant some internal duplication.

Writing in 1974 Mant and Nielson noted with respect to the post-war period that:

One of the primary reasons for the rapid increase in government legislation concerning land use, environment and conservation....has been the increasing recognition that land use decisions freely made by private individuals, corporations and for that matter governments, which serve their own interests, all too often have negative flow-on effects which have impact on the community at large.¹³³

Modern planning regulatory systems have been built on a policy of promoting the public interest in sustainable use of land and resources and are designed as a means of overseeing the effective implementation of that policy.¹³⁴ In response to the United Nations Bruntland Report, Australian governments acknowledged in 1992 the importance of a forward planning system.¹³⁵ In that year, the *National Strategy for Ecologically Sustainable Development* was released. The

¹³⁰ ‘Hobart Corporation Bill passes: New clause approved’ *The Mercury* (Hobart), 24 April 1947, 37-38.

¹³¹ ‘Corporation Bill Amendments’ *The Mercury* (Hobart) 2 October 1947, 45.

¹³² Eg *The Hobart Corporation Act 1963* repealed all previous *Hobart Corporation Acts*.

¹³³ Mant and Nielson, above n 112, 23; see also Anstey above n 55; Davis above n 55.

¹³⁴ England, *Integrated Planning in Queensland* (The Federation Press 2001), 2.

¹³⁵ McLeod, above n 59, 44 citing Council of Australian Governments Ecologically Sustainable Development Steering Committee (December 1992) and *Report of the World Commission on Environment and Development: our common future* (1987) Chaired Groh Harlem Bruntland; see also summary of key periods of planning policy 1979-2013; Gurran, Austin and Whitehead above n 2, 190 (Table 2).

Strategy provides for a Goal, Core Objectives and Seven Guiding Principles.¹³⁶ The *Strategy* is designed to provide a balanced approach to decision-making and to ensure that economic, environmental, social, and equity considerations are all taken into account. The Guiding Principles refer to the need to take account of environmental considerations. They also recognise the need for a strong internationally competitive economy in order to enhance environmental protection. These principles are reflected in the Objectives of Tasmania's planning system and process and are spelt out in Schedule 1 Parts 1 and 2 of the *Land Use Planning and Approvals Act 1993*.

C *The test for regulation*

Evaluation of the effectiveness of a regulatory system is the eventual obligatory question prompted by an examination of a regulatory system.¹³⁷ To ask whether regulation is effective is to ask – “does it work?”¹³⁸ Whether regulation is successful has been said to be ‘typically and primarily assessed in terms of its effectiveness: the extent to which it ensures that the chosen policy goal is achieved in practice.’¹³⁹

In evaluating regulation, theorists have referred to qualities other than effectiveness. Freiberg refers to the test of whether regulation is ‘effective, efficient and just.’¹⁴⁰ Gunningham and Grabosky refer to the criteria ‘that find their way into almost all lists,’¹⁴¹ including effectiveness, efficiency, equity and, they add political acceptability. Parker and Braithwaite use ‘effectiveness, responsiveness and coherence’ to refer to the extent to which regulation shapes

¹³⁶ Australian Government, Department of the Environment and Energy
<<http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy>>

¹³⁷ Freiberg, above n 14, 260.

¹³⁸ Freiberg, above n 14, 260; Australian Law Reform Commission, above n 107 [3.111].

¹³⁹ Karen Yeung, ‘Towards an understanding of regulation by design’ in Roger Brownsword and Karen Yeung (eds), *Regulating Technologies: Legal Futures, Regulatory frames and technological fixes* (Oxford Hart Publishing 2008) 79,91.

¹⁴⁰ Freiberg, above n 14, viii.

¹⁴¹ Gunningham and Grabosky above n 14, 26.

social practices, the extent to which it is efficient and involves practicality of compliance and the extent to which it is certain, consistent and predictable.¹⁴²

Planning regulation has its genesis in the protection and promotion of the public interest. The public has a stake in the successful operation of the regulation. Such regulation should consequently be an effective, efficient means of achieving the policy goals set for it.

D *Efficiency*

In assessing regulation, efficiency is used in the sense of the relationship between applied resources and desired outcome.¹⁴³ Cost/benefit analysis is one method of assessing the efficiency of regulation.¹⁴⁴ In formulating what has come to be known as the Coase Theorem,¹⁴⁵ Ronald Coase highlighted the costs to be taken into account. Those costs may be incurred not only in creating regulation, but also in complying with it. Such costs include 'transaction costs,' which may be costs of negotiating contracts and completing transactions.¹⁴⁶

Less obvious costs may be incurred as regulation is made by fallible administrations that are subject to political pressure and operating without competitive market checks.¹⁴⁷ It is possible that the economic gain from regulatory intervention may be less than the costs involved in or resulting from it.¹⁴⁸

Government intervention may not always increase efficiency but it should also not be presumed that it will always reduce efficiency. This may be particularly so if a large number of people are affected as the costs of resolving the problem by

¹⁴² Parker and Braithwaite, above n 14, 127-129.

¹⁴³ Freiberg, above n 14, 263.

¹⁴⁴ Productivity Commission of Australia, above n 2, [XIX]; Freiberg, above n 14, 263; Australian Government Guide to Regulation above n 23, 'RIS Question 4', 5.

¹⁴⁵ Coase, above n 15, 2.

¹⁴⁶ Ibid, 15; see also Lawrence Lai, The ideas of Ronald H Coase *Market failure and planning by contract for sustainable development* (Routledge 2011) 48 [3.3.3], 226 [8.3].

¹⁴⁷ Coase, above n 15, 18.

¹⁴⁸ Ibid.

the operation of market forces may be prohibitively high. Government intervention may consequently be the most cost-effective way to achieve a policy goal.¹⁴⁹ Planning regulation is an example of such intervention as it is enacted to control the use and development of land. Land is a valuable economic resource. Market forces such as price, may not be sufficient to protect the public interest in sustainable development, the conservation of natural habitat, or the establishment of public open space.

E *Political acceptability*

Regulation may be nevertheless ineffective when assessed against non-instrumental values that contribute to its being 'politically acceptable' and so encourage compliance. Similar values are reflected in the 'three dimensions of rules'¹⁵⁰ being transparency, accessibility, and congruence with the policy objective. Regulatory theorists analyse how regulation can become ineffective because it fails to reflect societal attitudes and is rejected as irrelevant, inefficient and disproportionate.

Julia Black suggests three reasons why regulation becomes ineffective and her categories of Inclusiveness, Indeterminacy and Interpretation offer a structure for grouping the work of regulatory theorists that shares common themes.¹⁵¹

Inclusiveness encompasses congruence between the rule and its purpose, if policy targets are missed or inefficiencies occur, the regulated will change their attitude to a rule.¹⁵² Regulation may be Indeterminate and such indeterminacy unavoidable, simply because regulation must be expressed in words that will inevitably be inadequate to express the vagaries of future events.¹⁵³ Interpretation focuses on Parliament's intent but it is not enough that there is

¹⁴⁹ Ibid.

¹⁵⁰ Diver, above n 103, 67.

¹⁵¹ Morgan and Yeung, above n 14, 153-158 quoting Julia Black *Rules and Regulators* (Clarendon Press 1997) 5-45.

¹⁵² Ibid. Yeung notes the development of formalism, referred to below n 425; chapter 6 discusses the techniques used to avoid the effect of the 'lease as subdivision' provisions.

¹⁵³ Ibid. Braithwaite below n 188; refers to the development of a 'grey area' as the boundaries of regulation are tested and chapter 6 discusses what Butt suggests might be 'the crafting' of leases to avoid the effect of the 'lease as subdivision' provisions, below n 446.

judicial understanding of regulation. The community must have connection if the legitimacy of the regulation is to be maintained and the regulated are to be willing and encouraged to give it allegiance.¹⁵⁴

Considerations such as these highlight that elements other than those that can be measured may need to be considered, as the measurable elements may not be those that reveal the most about how well a regulatory system is performing.¹⁵⁵ In the case of subdivision regulation, the number of issued permits or registered subdivision plans may not be accurate measures of the effectiveness of the regulatory system.

F *Designing effective regulation*

If a regulatory system fails to perform well, the result may not only be failure to meet policy goals. Other consequences include unnecessary financial costs, including those associated with the postponement of the policy goal, erosion of confidence in the law, and undermining of other regulation and the law itself.¹⁵⁶

The work of systems theorists such as Teubner analyses how it is that these consequences come about as regulation loses its connection with society and a 'regulatory trilemma' develops.¹⁵⁷ Teubner argues that the solution lies in greater integration between society and the law through a system of joint information and interference¹⁵⁸ and the use of more flexible regulatory strategies.¹⁵⁹ Such regulatory strategies have developed as regulators have

¹⁵⁴ Julia Black *Rules and Regulators* (Clarendon Press 1997) 12-19; Morgan and Yeung, above n 14, 11.

¹⁵⁵ Australian Law Reform Commission, above n 107, [3.111].

¹⁵⁶ Freiberg, above n 14, 269 citing Organisation for Economic Cooperation and Development, *Comparing Regulatory Systems: Institutions, Processes and Legal Forms in Industrialised Countries* Report (2000) Ch 2.

¹⁵⁷ Gunther Teubner in Teubner (ed) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate Anti Trust and Social Welfare Law* (Walter de Gruyter 1987) 18 [3.3] at 19, 22 [4.1].

¹⁵⁸ Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993) 65.

¹⁵⁹ Teubner above n 157, 40 [5.3]. As noted by Ann Wardrop 'Co-regulation, Responsive regulation and the reform of Australia's retail electronic payment systems' (2014) 30 *Law in Context* 197, 201, the 'very high level of abstraction' of systems theory alienates some regulatory scholars and for others they are controversial and far-reaching (see Bradley C Karkkainen 'New

sought to address what has been called ‘the failure of command-and-control regulation.’¹⁶⁰ Such regulation consists of prescriptive rules focused on enforcement by the state with penalties for non-compliance.¹⁶¹

The publication of *Responsive Regulation: Transcending the deregulation debate*¹⁶² was a response to the debate that arose from that failure, and prompted a much broader view of what regulation is and can achieve.¹⁶³ Although responsive regulation has attracted criticism,¹⁶⁴ it has been the foundation for ‘win/win solutions’ and innovative regulatory design¹⁶⁵ and has been adopted by Australian regulators and governments.¹⁶⁶ Responsive regulation underlies smart regulation that has been introduced into planning and environmental fields in Australia.¹⁶⁷

A central feature of responsive and smart regulatory design is that it is able to respond to the industry it regulates.¹⁶⁸ Regulators may, however, need assistance to engage with and to adapt the various responsive regulatory techniques to a particular industry.¹⁶⁹ Designers of smart regulation emphasise that because of its range of actors and regulatory tools, monitoring and evaluation must be

Governance” in legal thought and in the world: some splitting as antidote to overzealous lumping’ (2004) 89 *Minnesota Law Review* 471, 483.

¹⁶⁰ Wardrop, above n 159, 201.

¹⁶¹ Parker &, Braithwaite above n 14, 127 [4].

¹⁶² Ayres & Braithwaite, above n 14.

¹⁶³ The influence of responsive regulation is acknowledged by Gunningham and Grabosky above n 14; Freiberg, above n 14; Wardrop above n 159.

¹⁶⁴ The criticism may be grouped into ‘policy or conceptual’, ‘practical’ and ‘the principled’. Robert Baldwin and Julia Black, ‘Really responsive regulation’ (2008) 71 *Modern Law Review* 59, 62-64; also Morgan and Yeung above n 14, 201 quoting K Yeung *Securing Compliance* (Hart Publishing 2004).

¹⁶⁵ Gunningham & Grabosky above n, 14, 11.

¹⁶⁶ Freiberg, above n 14, 105-106; Wardrop above n 159, 227, refers to the ‘embrace ...of the toolkit of responsive regulation’ by Australian governments and regulators.

¹⁶⁷ See eg Paul Martin and Neil Gunningham ‘Natural Resource Management Law: Core Principles’ (2011) 28 *Environment and Planning Law Journal* 137; Neil Gunningham, Cameron Holley and Clifford Shearing ‘Neighbourhood Environment Improvement Plans: Community empowerment, voluntary collaboration and legislative design’ (2007) 24 *Environment and Planning Law Journal* 125.

¹⁶⁸ Wardrop above n 159, 227.

¹⁶⁹ *Ibid* 197.

maintained.¹⁷⁰ Policy adjustments may need to be made in the interests of effectiveness as diminishing returns may develop over time.¹⁷¹

Such policy adjustments may be through review procedures such as Regulatory Impact Analysis. Australian policymakers have adopted such analysis in order to refine policymaking and to review and assess the effectiveness of regulation. The Australian Government requires policymakers to include a regulatory impact statement that addresses seven issues. Those issues include identification of the problem to be addressed, the net benefit of each policy option, and how each option will be implemented and evaluated.¹⁷²

The Productivity Commission assessed how well Australian jurisdictions were conducting Regulatory Impact Analysis in a 2012 report.¹⁷³ The Report concluded that Australian procedures were ‘reasonably consistent’ with guiding principles for regulatory impact analysis promulgated by both the Organisation for Economic Co-Operation and Development (OECD) and the Council of Australian Governments (COAG).¹⁷⁴ The Commission noted that there were some shortcomings in system design and a gap between agreed principles and practice. In the case of planning regulation, such shortcomings may be explained by the costs required to assess the costs and benefits of the regulation. Such assessment can be complicated, costly, time-consuming, and is dependent on adequate databases.¹⁷⁵

G *Effective regulation*

In summary:

- Effective regulation is regulation that is a cost-effective means of achieving a policy goal.

¹⁷⁰ Holley and Gunningham above n 16.

¹⁷¹ Ibid.

¹⁷² Australian Government, above n 23, 5.

¹⁷³ Productivity Commission of Australia ‘Regulatory Impact Analysis: Benchmarking’ Research Report (2012) key points 2.

¹⁷⁴ Ibid.

¹⁷⁵ Department of Infrastructure (Victoria) *National Competition Policy Review of Victoria’s Planning and Environment Act 1987 and Associated Subordinate Instruments* Final Report (2001) 47-48.

- Such regulation is efficient in terms of the costs (including both direct and indirect costs) incurred in complying and not complying with it.
- Regulation, the wording of which is unclear or that requires further resources to interpret it, will not be efficient.
- Compliance is encouraged if regulation is efficient.
- Effective, efficient regulation is also politically acceptable and recognised by the regulated as justifiable, legitimate and consistent with the aims and aspirations of the society it regulates.
- Regular review of regulation is an essential means of ensuring that it retains its social legitimacy and that it is the most cost-effective and efficient means of achieving a policy goal.

This study adopts these principles in analysing and studying Part 3. Chapter 4 provides context and background to planning regulation and outlines Tasmania's planning system before considering the interaction of Part 3 with the *LUPAA* system and whether that interaction is an efficient, cost-effective means of achieving the policy goal that underpins the system. Chapters 5 and 6 examine particular provisions of Part 3 against the background of what is effective regulation as summarised above. The chapters note problems with unclear wording, cumbersome, costly procedures and redundant policy. In the case of the lease as subdivision provisions chapter 6 also notes a loss of legitimacy as techniques such as formalism are employed to avoid the effect of the regulation.

CHAPTER 4 – THE ROLE OF THE PREVAILING REGULATION FOR SUBDIVISION IN TASMANIA

This chapter will provide context and background. It will outline the typical planning assessment process in Australia and note that coherence and cohesiveness are both important to the effective operation of a planning system. The chapter will then move to outline the essential features of the Torrens system of land registration and Tasmania's planning system. As noted in chapter 3, the effectiveness of regulation is assessed by how well it works as a means of achieving a policy goal. This chapter will build on the material introduced in chapter 3 and look firstly at the policy aims of the Tasmanian planning system before outlining how planning assessment works in Tasmania under the *Land Use Planning and Approvals Act 1993* (Tas) and then introducing Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993*. The chapter concludes that the lack of integration of Part 3 into the system established under *LUPAA* has implications for the effectiveness of Tasmania's planning regulation as far as subdivision is concerned.

I CONTEXT AND BACKGROUND

In 2011 the Productivity Commission examined the performance of Australian planning regulation and although the systems of each state and territory vary and direct comparison is difficult, the basic development assessment process is the same.¹⁷⁶ The Commission outlined the typical process as follows:

- The applicant lodges an application with necessary documents and fees;
- The assessment authority checks the application and requests additional information if the application is incomplete;
- The application may be passed to referral agencies and placed on exhibition for comment from owners of neighbouring properties and from the community (these may not happen concurrently);

¹⁷⁶ Productivity Commission of Australia, above n 2, Vol 1, 76; ch 3 summary of Australian planning systems and development assessment processes.

- Relevant assessment authorities consider the application, taking into account comments, submissions, and what is allowed under the planning regulation;
- The assessment authority decides to reject, approve, or conditionally approve the application;
- The applicant (or a third party, in some cases) may apply for independent review of the decision.¹⁷⁷

The process is costly in terms of both time and financial expense. The Commission noted that the statutory timeframes for assessment of proposals vary among Australia's jurisdictions.¹⁷⁸ Those timeframes can present hurdles for developers and significantly affect the efficiency of planning regulatory systems.

Efficiency in this context is used in the sense of the relationship between applied resources and the desired outcome.¹⁷⁹ That relationship is highlighted by a cost-benefit analysis that must include both the direct costs and the indirect costs of regulation. Planning regulation is regulation that affects competition. The Tasmanian Legislative Review program requires that such regulation firstly deliver benefits that outweigh the costs it imposes, and secondly that those benefits be ones that can only be achieved by restricting competition.¹⁸⁰

The Productivity Commission summarised the typical direct costs of planning assessment regulation:

- [P]rocedural requirements (preparing, submitting and providing supporting material for planning amendments (rezoning) or development applications);

¹⁷⁷ Ibid, 78.

¹⁷⁸ Ibid.

¹⁷⁹ Freiberg, above n 14, 263.

¹⁸⁰ Department of Primary Industries Water & Environment (Tas) 'Review of the Land Use Planning and Approvals Act 1993' Minor Review Statement (January 2000), [1.1].

- Compliance costs of meeting specified development controls (location, operating hours, business format, housing density, amenity, environmental, and heritage requirements);
- Fees and charges – application or other administration fees; charges to verify developments accord with approved drawings; reports and conditions of development and developer contributions...for local, headwork and community infrastructure provisions; and
- Increased holding costs associated with unnecessary delays in obtaining planning approval.¹⁸¹

Indirect costs add to the risk and compliance burden, including:

- Uncertain and protracted timeframes;
- Complex, inconsistent, and unpredictable regulatory frameworks; and
- Intra- and inter-jurisdictional differences in administration and regulatory processes.¹⁸²

Such direct and indirect costs may be unavoidable as planning decisions can be complex and require trade-offs between the interests of the proponent and the various parties affected by a development proposal. The Tasmanian Department of Treasury and Finance administers regulatory review as part of the Government's commitment to the Council of Australian Governments' regulatory reform program under the National Competition Policy and the Competition Principles Agreement. The Department of Primary Industries, Water & the Environment conducted such a review of the *Land Use Planning and Approvals Act 1993* (Tas) in 2000. The Terms of Reference emphasised the impact of the legislation on competition. The report nevertheless noted the trade-offs as it referred to the broader community benefit to be derived from the permit process, and the sustainable development objective of the Tasmanian planning system and processes.¹⁸³

¹⁸¹ Productivity Commission of Australia, above n 2, 228.

¹⁸² Ibid.

¹⁸³ Department of Primary Industries Water & Environment above n 180, [4.3]

The efficiency and the effectiveness of a planning regulatory system may be reduced if there is lack of coherence among the various parts of the system. The Productivity Commission has highlighted that unreviewed rolling reform to planning regulatory systems risks incoherence.¹⁸⁴

Tasmania's system for subdivision assessment and implementation is particularly susceptible to incoherence. Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* was introduced as a means of carrying forward existing subdivision regulation to the LUPAA system pending a broader review. Although there has been minor amendment, the extensive review referred to and that was foreshadowed in 1993 has not taken place. That such review has not taken place raises the question of how effective Part 3 is.

Effective regulation is an efficient means of achieving policy purpose. Such regulation may achieve that purpose because when assessed using cost-benefit analysis, it is the most cost-effective means of achieving a policy goal. The financial cost is however, not the only relevant factor when assessing the effectiveness of regulation. Regulation should also be clear, understandable, consistent, relevant and cohesive. Unless the law is also certain, '...ongoing relations and dealings [are] at risk of whim and fancy.'¹⁸⁵ The Queensland Government noted the importance of such factors in the 2015 Directions Paper: *Better Planning for Queensland*:

Practical well-structured legislation is crucial so that it is easy to understand and apply, and can be used to create planning schemes that are purposeful and establish sensible and straightforward development requirements. Having practical legislation will also assist the community when engaging with the framework.¹⁸⁶

¹⁸⁴ Productivity Commission above n 2

¹⁸⁵ Pagone GT, 'Tax Uncertainty' (2009) 33 *Melbourne University Law Review* 886-7.

¹⁸⁶ Queensland Government, *Better Planning for Queensland*, May 2015, 9.

Coherence and consistency are particularly important in planning systems. Planning regulatory systems comprise not only primary legislation, but also subordinate regulation such as planning schemes. Inconsistency between a statute and a planning scheme may result in a finding that the inconsistent part of the planning scheme is repugnant in the sense that it is beyond power and accordingly invalid.¹⁸⁷

Uncertainty and delay will also result if there are inconsistencies in terminology and effect between primary legislation and subordinate instruments. Determining whether there is such an inconsistency requires a decision on what Parliament intended. That decision means assessing whether there can be reconciliation between the components of the regulatory system. Such assessment may require significant financial expenditure. To some extent the costs and delay associated with the need for such assessment will nevertheless be inevitable as words will invariably be inadequate. Braithwaite refers to such inadequacy when he writes of a 'grey area' that develops around the edges of regulation. Such indeterminacy encourages testing of the regulation, especially if there is significant financial incentive to avoid its application.¹⁸⁸

Planning assessment requires significant expenditure of both time and money and the financial implications of its application are high. There is consequently substantial incentive to test its scope and application. The regulation that underlies planning systems must be as coherent and cohesive as possible in order for planning regulatory systems to be effective. The inevitable uncertainty that attaches to the meaning of words and the procedures they establish needs to be minimised.

Subdivision regulation, unlike other forms of planning regulation, faces further challenges, as it cannot be considered in isolation. Subdivision regulation must inevitably interact with the land registration system. The following paragraphs

¹⁸⁷ *Griffin v Resource Management and Planning Appeal Tribunal* [2010] TASSC 8 (2 March 2010), [7] citing *R v Minister of the Interior* (1972) 20 FLR 449; 457-458.

¹⁸⁸ John Braithwaite 'Rules and Principles: a theory of legal certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47, 54.

outline the essential features of the Torrens system of land registration as background to the examination of Tasmania's planning system and the provisions of Part 3 that follows.

II THE TORRENS SYSTEM OF LAND REGISTRATION

Under Torrens systems, such as those that apply in Australia,¹⁸⁹ registration by the titles administrator of dealings is much more than the mere notification that applies in recording systems.¹⁹⁰ In designing the Torrens system, Sir Robert Torrens sought to 'strike a blow' at the existing English land registration system that enabled the 'grievous injury and injustice...misery and ruin' that befell his friend when a defect in historical title to purchased land was found.¹⁹¹ Under the English system of the time, it was impossible to establish the precise status of title to land without expensive, time-consuming examination of the documentary history of the transactions affecting that land.

Torrens designed a system under which all interests affecting land were to be shown on the register. As outlined more fully below, under the Torrens system registration confers paramount status or indefeasibility on the registered dealing. The title of the registered proprietor under the Torrens system '... is cleared of any errors, mistakes or defects, the process of registration acting as a purge of past omissions or incorrect additions.'¹⁹² Registration is central to the Torrens system and required to pass an estate or interest at law.¹⁹³ An

¹⁸⁹ Land registration systems in Australia are predominantly Torrens system (*Land Title Act* (NT), *Real Property Act 1900* (NSW), *Land Title Act 1994* (Qld), *Real Property Act 1886* (SA), *Land Titles Act 1980* (Tas); *Transfer of Land Act 1958* (Vic); *Transfer of Land Act 1893* (WA) although in some jurisdictions (including Tasmania) land is still registered under the General Law system. However the process of conversion is underway with the Land Titles Office automatically converting land on conveyance and with conversion being a prerequisite for subdivision. *Land Titles Act 1980* (Tas) s 17A.

¹⁹⁰ L Griggs, R Low, R Thomas 'Accounting for risk: The advent of capped conveyancing title insurance' (2016) 24 *Australian Property Law Journal* 371; title recording systems exist in France and the USA.

¹⁹¹ Les A McCrimmon 'Protection of Equitable Interests Under the Torrens system: Polishing the Mirror of Title' (1994) 20(2) *Monash University Law Review*, 300, 301 quoting R R Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859) v-vi.

¹⁹² Griggs, Low, Thomas above n 190.

¹⁹³ *Land Titles Act 1980* (Tas), s 49(1).

unregistered instrument may give entitlements in equity but they will depend on the availability of specific performance.¹⁹⁴

In 1952, Ruoff wrote articles that offered an outsider's (an Englishman's) 'disinterested observations' as he described and commented on the three fundamental features of the Torrens system.

- Firstly the 'mirror' – the principle that the Register will reflect all facts material to a landowner's title.¹⁹⁵
- Secondly the 'curtain' – the principle that a purchaser need not look behind the Register as it is the sole source of information on title.¹⁹⁶
- Thirdly the insurance principle by virtue of which anyone who suffers loss due to a flaw in the mirror will be compensated.¹⁹⁷

Ultimately the principle at the heart of the Torrens system is that the Register is everything.¹⁹⁸ The Torrens legislation varies in Australian jurisdictions but the principle underlying it is that 'it is a system of title by registration, not a system of registration of title.'¹⁹⁹ A registered proprietor is vested with title by virtue of registration.²⁰⁰

The holder of a registered interest in land is the holder of the benefits of conclusive evidence as to the entitlement of that estate or interest.²⁰¹ The registered interest is paramount and will not be subject to erosion or destruction by unregistered interests, even though they may pre-date the registered

¹⁹⁴ G Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters Law Book Co 5th ed 2011) [1.165]; *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242.

¹⁹⁵ TBF Ruoff 'An Englishman looks at the Torrens System: Part I the mirror principle' (1952) 26 *Australian Law Journal* 118.

¹⁹⁶ TBF Ruoff 'An Englishman looks at the Torrens System: Part II simplicity and the curtain principle' (1952) 26 *Australian Law Journal* 162.

¹⁹⁷ TBF Ruoff 'An Englishman looks at the Torrens System: Part III' (1952) 26 *Australian Law Journal* 194.

¹⁹⁸ *Land Titles Act 1980* (Tas), s 40(3).

¹⁹⁹ *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ; [1971] HCA 70 cited in *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2 (4 February 2015), [16].

²⁰⁰ *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ; [1971] HCA 70 cited in *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2 (4 February 2015), [16]. See also *Clarence City Council v Howlin* [2016] TASSC 61 (21 November 2016) [26]-[32].

²⁰¹ *Land Titles Act 1980* (Tas), s 39(2).

interest.²⁰² A registered interest is consequently accorded priority as opposed to those interests registered subsequently.²⁰³ There are statutory exceptions to indefeasibility (including fraud), and also non-statutory exceptions (including the in personam exception).²⁰⁴

Some commentators have suggested that the Torrens mirror may be in need of polishing. The status of unregistered interests in the Torrens system is one such topic that has prompted comment.²⁰⁵ Increasingly conflict with planning instruments, is another.²⁰⁶ The interaction between planning regulation and the Torrens system leads to complexity, and conflict arises because of the fundamental features of the Torrens system. The Torrens system is designed to establish and protect private interests in land. The implementation of planning policy through the land registration system means that it is used as a means of enforcing planning controls, with such controls designed to promote public policy. Planning controls, such as the regulation of subdivision, may come into conflict with the land registration system that is designed to provide a reliable and full record of private rights and interests in land.²⁰⁷

Statutory rights and obligations designed to promote sustainable development and government policies to protect the community at large may create inconsistencies and exceptions in the land registration framework that affect the indefeasible title of the registered proprietor.²⁰⁸ There is a collision in purpose between planning statutes designed to protect the public interest over the demands of participants in a market for real estate. Those participants require

²⁰² *Land Titles Act 1980* (Tas), s 40(1).

²⁰³ *Land Titles Act 1980* (Tas), s 48(5).

²⁰⁴ See Tang Hang Wu, 'Beyond the Torrens Mirror: a framework of the in personam exception to indefeasibility' (2008) 32 *Melbourne University Law Review* 672.

²⁰⁵ McCrimmon, above n 191.

²⁰⁶ Sharon Christensen and WD Duncan, 'Aligning Sustainability and the Torrens register: challenges and recommendations for reform' (2012) 20 *Australian Property law Journal* 112; see also Brendan Edgeworth 'Planning Law v Property Law: Overriding statutes and the Torrens system after *Hillpalm v Heaven's Door* and *Kogarah v Golden Paradise*' (2008) 25 *Environmental and Planning Law Journal* 82.

²⁰⁷ Christensen and Duncan above n 206.

²⁰⁸ *Ibid* [2].

cheap, efficient and secure property transactions and the certainty that results from registration under the Torrens system.²⁰⁹

One notable example of that conflict is the conflict that arises from the inclusion of leases of part of a block of land within subdivision. The effect of the legislative provisions is an example of the complexity of the interaction between the land registration system and regulatory provision for subdivision in planning systems. Australian planning regulation, in common with that of some Canadian jurisdictions and New Zealand, includes within the definition or treatment of subdivision the leasing of part of a block of land.²¹⁰ The treatment of such leases as subdivisions means that they may be submitted to the same planning assessment process as the division of a fee simple title. In addition to the resultant cost and delay, a lease may not meet the standards applicable to ‘the conventional notion of subdivision, namely the creation of additional titles out of an existing title.’²¹¹

The issues that arise highlight how regulation may fail to be effective and the consequences of such failure. The effect of the provisions has prompted the development of techniques to avoid their application. The application of the provisions poses more far-reaching questions, including the enforceability of leases that do not comply with planning assessment and the position of such leases when registered in the Torrens system. The difficulty is compounded in the case of the Tasmanian provisions because of uncertainty in their meaning and scope. The ‘lease as subdivision’ provisions and the issues they raise are examined in chapter 6.

²⁰⁹ Edgeworth, above n 206, 82; see also Peter Butt ‘Indefeasibility Overridden – Significantly’ (2003) 77 *Australian Law Journal* 88 and ‘Planning vs Property Rights’ (2011) 85 *Australian Law Journal* 711, 712.

²¹⁰ *Planning & Development Act 2007* (ACT) s 7(2); *Environmental Planning and Assessment Act 1979* (NSW) s 6.2, (3)(D), *Conveyancing Act 1919* (NSW) s 23G(d), *Planning Act 1999* (NT) s 5(3); *Sustainable Planning Act 2009* (Qld) s 10(1); *Planning Act 2016* (Qld) Sch 2; *Development Act 1993* (SA) s 4 (10(c); *Planning, Development and Infrastructure Act 2016* (SA) s 3(1); *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas), s 80; Western Australia does not include leases as subdivisions, but provides for a separate planning assessment of leases *Planning and Development Act 2005* (WA) ss 136, 139; *Resource Management Act 1991* (NZ) s 218(1)(a)(iii); *Municipal Government Act* RSA 2000, cM-26 s 616(ee); *Land Title Act*, RSBC 1996, c 250 s 73(1).

²¹¹ *Benmar Properties Pty Ltd v Makucha* [1993] QSC 269 (10 September 1993), 17 Thomas J.

III TASMANIA'S PLANNING SYSTEM

In evaluating a regulatory system, those involved 'typically and primarily assess.....the extent to which it ensures that the chosen policy goal is achieved in practice.'²¹² Accordingly in order to assess the effectiveness of a regulatory system, the policy goals that underlie the system must be identified. The *Land Use Planning and Approvals Act 1993* (Tas) (LUPAA) and the *State Policies and Projects Act 1993* (Tas) set out the policy goals of Tasmania's planning system. The Acts also establish the regulatory framework and structure for Tasmania's resource management and planning system and the assessment process. They provide for state planning policies, regional planning strategies and planning schemes.

The focus of the system is the achievement of sustainable development defined as:

[M]anaging the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –

- (a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
- (c) avoiding, remedying or mitigating any adverse effects of activities on the environment.²¹³

The system aims to include consideration of the environment and the capability of land in the planning framework and in the making of decisions on the use and development of land.²¹⁴ The planning process also aims to be an integrated

²¹² Yeung, above n 17, 91.

²¹³ *Land Use Planning & Approvals Act 1993* (Tas) Sch 1 Part 1.

²¹⁴ *Land Use Planning & Approvals Act 1993* (Tas) Sch 1 Part 2.

system of environmental, social, economic, conservation and resource management policies.²¹⁵

There are three state policies issued under the *State Policies & Projects Act 1993* that regulate land and environment use and management.²¹⁶ In addition, three regional land use strategies have been declared that set out the long term planning goals and land use policies and strategies for the three Tasmanian regions.²¹⁷ The strategies are a joint initiative between the state and local governments and are to be ‘monitored, maintained and reviewed in an ongoing process to ensure they remain relevant and responsive.’²¹⁸ The strategies are intended to fill the gap between the broad objective of sustainable development and locally relevant land use planning directions including the integration of infrastructure and services with the development of land.²¹⁹ In addition to state policies and regional strategies the Minister may issue planning directives on planning matters including as to the content of planning schemes.²²⁰

The Tasmanian Planning Commission is established under the *Tasmanian Planning Commission Act 1997* (Tas) with its functions including advice to councils in relation to planning schemes.²²¹ LUPAA sets out what planning schemes may provide for.²²² Legislation to enable the introduction of the single state-wide scheme was assented to in December 2015,²²³ with the intent that the scheme be operational by the end of 2017.²²⁴ State Planning Provisions have

²¹⁵ *Land Use Planning & Approvals Act 1993* (Tas) Sch 1 Part 2.

²¹⁶ The policies are the Tasmanian State Coastal Policy 1996, the State Policy on Water Quality Management 1997 and the State Policy on the Protection of Agricultural Land 2009. S 12A of the Act also recognizes national environment protection measures as state policies.

²¹⁷ *The Living on the Coast – Cradle Coast Regional Land Use Planning Framework 2011; The Regional Land Use Strategy of Northern Tasmania January 2016; The Southern Tasmanian Regional Land Use Strategy 2010-2035.*

²¹⁸ *The Southern Tasmanian Regional Land Use Strategy 2010-2035*, [1.1].

²¹⁹ *The Southern Tasmanian Regional Land Use Strategy 2010-2035*, 17 [SD1]..

²²⁰ *Planning Directive No 1 – The Format and Structure of Planning Schemes* came into effect on 17 February 2016.

²²¹ *Tasmanian Planning Commission Act 1997* (Tas) s 6(1A)(c)

²²² *Land Use Planning & Approvals Act 1993* (Tas) s 11.

²²³ *Land Use Planning & Approvals (Tasmanian Planning Scheme) Amendment Act 2015* (Tas).

²²⁴ Tasmanian Government Tasmanian Planning Scheme Fact Sheet
<http://www.justice.tas.gov.au/tasmanian_planning_reform>

been declared with each council to prepare local provisions. Tasmania has 29 municipal councils and 30 planning schemes, with one scheme being dedicated to the Sullivans Cove area of Hobart.

Use and Development proposals in Tasmania are categorised by planning schemes as follows:

- Proposals may be Exempt (no application required);
- No Permit Required (does not rely on a performance criterion to meet applicable standards and is not discretionary or prohibited);
- Permitted (planning authority must issue permit if proposal meets standards and does not rely on performance criterion and is not discretionary or prohibited);
- Discretionary (planning authority has discretion whether or not to issue permit and may do so if proposal complies with standards but relies on a performance criterion to do so and is not prohibited);
- Prohibited (planning authority can not issue a permit).²²⁵

The commencement of a use or development that requires a permit is prohibited until the permit has been granted and is in effect.²²⁶ Under some Tasmanian interim planning schemes,²²⁷ a planning authority has discretion to refuse or grant a permit.²²⁸ Under other schemes such as the Launceston Interim Scheme, and the State Planning Provisions, subdivision may follow a permitted pathway

²²⁵ Explanatory Document to State Planning Provisions explains categories of assessment [6.4.5]-[6.5.9]

²²⁶ *Land Use Planning & Approvals Act 1993*, s 51; *Local Government Building & Miscellaneous Provisions) Act 1993*, s 81 provides for a fine not exceeding 50 penalty units (as at 1st July 2018 a Tasmanian Penalty unit is valued at \$163.00 - *Penalty Units & Other Penalties Act 1987* (Tas), s 4A(1).

²²⁷ The Southern Interim Planning schemes (common format for most of the southern and some northern councils) of which the Hobart planning scheme and also the West Tamar, Break O Day and Central Highlands schemes are examples, include a clause in the words of cl 9.7.2 of the Hobart scheme specifying that subdivision is discretionary.

²²⁸ Section 57 *Land Use Planning & Approvals Act 1993*; s 85 & s 85A *Local Government (Building & Miscellaneous Provisions) Act 1993* provide criteria for approval of subdivision; s 85 A(2) enables a subdivision to follow a permitted (as opposed to discretionary) pathway that means a permit must be granted if it complies with 'acceptable solution' set out in planning scheme. This amendment that took effect on 1st January 2015 enables a subdivision to be approved in circumstances that vary according to the zoning of the land. This contrasts with the restrictive provisions of s 84 that specifies requirements such as minimum lot sizes and prevents a council from approving a non-conforming subdivision.

(as opposed to discretionary pathway), if it conforms to certain acceptable solutions.²²⁹ The council acting as planning authority must give at least 14 days notice to the public of an application classed as discretionary, enabling the public to make representations before the council makes a decision.²³⁰ The planning authority cannot make a decision on an application for a permit earlier than 14 days from the date of advertising of the application.

The time available to local government planning authorities to make a decision on a proposal depends on whether the application concerns a development that will follow a permitted or discretionary pathway. A permitted pathway means that the authority must issue a permit within 28 days if the development meets acceptable solutions specified in zone provisions.²³¹ If the authority has a discretion to grant or refuse the permit, the authority has a maximum of 42 days.²³² Further time is available by agreement with the developer.²³³ Once the authority has made a decision an owner of land, the applicant, or a person who has made a representation have a period of 14 days to lodge an appeal with the Resource Management and Planning Appeal Tribunal.

The Tasmanian State Planning Provisions²³⁴ are an example of the standards that apply to a subdivision proposal that is assessed under the *LUPAA* system. Clause 5.6.1 provides that a use or development must comply with the standards in the State Planning Provisions that are applicable to a zone. The use or development must comply with either the more prescriptive acceptable solutions or rely on

²²⁹ The Launceston Interim scheme does not contain such a clause. The conditions a subdivision must fulfill vary and in some zones (such as the Rural Resource Zone) acceptable solutions for lot size and dimensions restrict the subdivision proposals that can follow permitted pathways.

²³⁰ *Land Use Planning & Approvals Act 1993* (Tas) s 57(5)

²³¹ *Land Use Planning and Approvals Act 1993* (Tas) s 58.

²³² *Land Use Planning and Approvals Act 1993* (Tas) s 57.

²³³ *Land Use Planning and Approvals Act 1993* (Tas) s 57(6) & (6A); s 58 (2A).

²³⁴ Tasmanian Government *State Planning Provisions*, <http://www.justice.tas.gov.au/_data/assets/pdf_file/0007/370294/State_Planning_Provisions.PDF> The State Planning Provisions (Part 3 *Land Use Planning and Approvals Act 1993*) include administrative, zone and code provisions that will apply state-wide; councils will prepare Local Provisions Schedules (Part 3A *Land Use Planning and Approvals Act 1993*) that will include maps and overlays and must include provisions required under the SPP and can not be inconsistent with the Tasmanian Planning Scheme. The Scheme will become operational once the Local Provisions Schedules have been approved.

meeting the performance criteria for that standard.²³⁵ Clause 6.1.2 of the Scheme provides that an application for approval of a use or development must include:

- details of the location of the use or development;
- a copy of the certificate of title;
- a full description of the proposed use or development.

In addition the planning authority may require a site analysis and plan. Where it is proposed to erect buildings, a detailed layout plan may be required.²³⁶ Clause 6.8.1 provides that a proposal will follow the discretionary pathway in certain circumstances including if the use or development does not fit an Acceptable Solution but relies on a Performance Criterion.

A subdivision proposal that meets the Acceptable Solution requirements will be permitted which means that a council must approve the development. Unlike proposals that are exempt, permitted proposals must still be checked against planning controls to verify they are permitted.²³⁷

The Table below is an extract from the State Planning Provisions and demonstrates the difference between Acceptable Solutions and the less prescriptive Performance Criteria.²³⁸ The objective of the development standards for subdivision include ensuring that each lot has an area and

²³⁵ Clause 5.6.1, 5.6.3 Tasmanian State Planning Provisions.

²³⁶ Clause 6.1.3 State Planning Provisions. A subdivision proposal no longer has to be classified into a Use class under the State Planning Provisions due to the difficulty of classifying some proposals into particular Use classes. Minister for Planning and Local Government *Explanatory Document for the draft of the State Planning Provisions of the Tasmanian Planning Scheme* 7 March 2016.

²³⁷ Clause 6.4.7 *Explanatory Document for the draft of the State Planning Provisions of the Tasmanian Planning Scheme* 7 March 2016; Local Government Association of Tasmania Submission to Tasmanian Government, 'Reforming Tasmania's Planning System Position Paper,' 2 October 2014, 11.

²³⁸ General Residential Zone [8.6] State Planning Provisions. The purposes of the General Residential Zone include provision of:

- residential use and development where full infrastructure services are available,
- the efficient use of social, transport and other infrastructure,
- compatible non-residential use that does not reduce amenity or displace residential use and serves the local community [8.1].

dimensions appropriate for use and development in the zone.

| Acceptable Solutions | Performance Criteria |
|--|---|
| <p>A1</p> <p>Each lot must:</p> <ul style="list-style-type: none"> (a) have an area of not less than 450m² and: <ul style="list-style-type: none"> (i) be able to contain a minimum building area of 10 m x 15 m with a gradient not steeper than 1 in 5 clear of: <ul style="list-style-type: none"> a. all setbacks...and; b. easements or other title restrictions that limit or restrict development; and (ii) existing buildings are consistent with setback... (b) be required for public use... (c) be required for the provision of public utilities or (d) be for the consolidation of a lot with another lot provided each lot is within the same Zone. | <p>P1</p> <p>Each lot, or a lot proposed in a plan of subdivision, must have sufficient useable area and dimensions suitable for its intended use having regard to:</p> <ul style="list-style-type: none"> (a) the relevant requirements for development of existing buildings on the lots; (b) the intended location of buildings on the lots; (c) the topography of the site; (d) the presence of any natural hazards; (e) adequate provision of private open space; and (f) the pattern of development existing on established properties in the area. |
| <p>A2</p> <p>Each lot, excluding for public open space, a riparian or littoral reserve or Utilities, must have a frontage of not less than 12m.</p> | <p>P2</p> <p>Each lot, or a lot proposed in a plan of subdivision, excluding for public open space, a riparian or littoral reserve or Utilities, must be provided with a frontage or legal connection to a road by a right of carriageway, that is sufficient for the intended use, having regard to:</p> <ul style="list-style-type: none"> (a) the width of the frontage proposed, if any; (b) the number of other lots which have had the land subject to the right of carriageway as their sole or principal means of access; (c) the topography of the site; (d) the functionality and useability of the frontage or access; (e) the anticipated nature of vehicles likely to access the site; (f) the ability to manoeuvre vehicles on the site; and (g) the pattern of development existing on established properties in the area <p>and is not less than 3.6 m wide.</p> |

Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* also contains provisions relevant to the assessment of a subdivision proposal. Despite the planning schemes established under the *LUPAA* system, the provisions of Part 3 still exist as separate or parallel assessment process for subdivision proposals. The next section will consider the provisions of Part 3 and its place in the *LUPAA* system.

IV PART 3 - ITS PLACE IN THE LUPAA SYSTEM

Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* is entitled 'Subdivision,' with its provisions tackling the task of the assessment and implementation of subdivision proposals in nine divisions. The various sections of Part 3 set out the procedural detail for the approval and registration of subdivision proposals. The provisions of Part 3 are stated to prevail over any other Act, regulation, rule, or by-law made under any other Act relating to subdivisions.²³⁹ By way of further introduction to Part 3, a brief outline of its provisions and structure follows.

Division 1 of Part 3 defines terms relevant to subdivision.²⁴⁰ Those terms include 'subdivide', 'public open space', 'minimum lot' and phrases to identify subdivision plans at different stages of the assessment, approval, and implementation process.

Division 2 of Part 3 deals with the approval process for subdivision. Section 81 provides that it is an offence to subdivide except in accordance with a previously approved plan or pursuant to a permit issued under LUPAA. Section 81(3) provides that in place of a fine, a landowner who subdivides in contravention of the section may be ordered to forfeit the value of the estate disposed of through the unauthorised subdivision.

Division 3 provides for 'final plans', being plans prepared once a council has granted a permit for a subdivision.

Division 4 provides for the registration by the Recorder of Titles of 'sealed plans' being plans that have been formally approved by a council. The Division also provides for land dedicated as a public roadway and easements.

Divisions 5 and 6 address amendment of sealed plans and miscellaneous matters in respect of plans.

²³⁹ *Local Government (Building & Miscellaneous Provisions) Act 1993* s 122.

²⁴⁰ *Local Government (Building & Miscellaneous Provisions) Act 1993* s 80.

Divisions 7 and 8 deal with minimum lots and public open space respectively.

Division 9 contains miscellaneous provisions including s 120 that saves contracts that might not comply with the provisions of Part 3. Section 122 declares Part 3 to be the prevailing regulation for subdivision in Tasmania.

Despite the assessment regime established under *LUPAA* and its planning schemes, the Part 3 provisions for the assessment of subdivision proposals still apply. These provisions set prescriptive standards such as the permitted size and frontage of proposed lots²⁴¹ and the drainage of roads.²⁴² By contrast, less prescriptive standards apply to the assessment of subdivision proposals under the *LUPAA* system.

Although there are still 30 planning schemes under the *LUPAA* system, the individualised municipal schemes have been replaced through the interim planning scheme program that has standardised Tasmanian planning schemes. The program has introduced more performance-based standards that can enable a subdivision to follow a permitted pathway where the subdivision conforms to the standards specified in the planning scheme.²⁴³

Part 3 was amended in 2014 as part of the current planning reform process and in preparation for the introduction of a single statewide planning scheme. The amendments enable assessment of subdivisions under *LUPAA* planning schemes to co-exist with the process established under Part 3.²⁴⁴ The amendments were required in order that Part 3 could accommodate the less restrictive interim planning schemes and State Planning Provisions that contain performance-based

²⁴¹ *Local Government (Building & Miscellaneous Provisions) Act 1993* s 109 retains the references to 'building areas' that were in the 1962 Act and that are no longer relevant to the planning system.

²⁴² *Local Government (Building & Miscellaneous Provisions) Act 1993* s 84(1).

²⁴³ As part of the streamlining legislation aimed at facilitating the reform program, *LUPAA* was amended in 2014 to enable planning schemes to contain performance-based standards; s 84(1A) was introduced by *Land Use Planning and Approvals Amendment (Streamlining of Process) Act 1993* s 53.

²⁴⁴ s 85A introduced by s 54 *Land Use Planning and Approvals (Streamlining of Process) Act 2014*.

standards. Those acceptable solutions and performance criteria are included in the interim planning schemes and the state-wide planning provisions. They enable a council to approve a plan of subdivision, despite its not complying with the prescriptive provisions of s 84 of the *Local Government (Building & Miscellaneous Provisions) Act 1993*.

Despite such legislative amendment Part 3 has not been integrated or consolidated with the LUPAA system. The Government has acknowledged that the continued existence of Part 3 means there are 'two sets of controls for subdivisions.'²⁴⁵ The Attorney General referred to the 'safety net' of Part 3 being retained as old municipal planning schemes were replaced by the standardized interim planning schemes.²⁴⁶ This section of chapter 4 seeks to explore the implications for Tasmania's planning system of the continued existence of Part 3. Part 3 is Tasmania's prevailing legislation for subdivision and it continues to exist at a time when extensive restructuring and reform of the LUPAA system is taking place.

A *The provisions of Part 3 and their place in Tasmania's Planning System*

The Part 3 assessment provisions include those stipulating standards with which plans must comply and provisions dealing with matters such as public roads, public open space, and infrastructure. Part 3 establishes a system that grants powers and discretions to 'councils' as opposed to the 'planning authorities' referred to in LUPAA. The powers and discretions granted to councils by Part 3 in the assessment of subdivision proposals are not granted under LUPAA. Under Part 3 councils are given discretion not to approve subdivisions.²⁴⁷ There are also prescriptive provisions prohibiting the approval by councils of certain plans of subdivision, subject to the application of LUPAA planning scheme provisions.²⁴⁸

²⁴⁵ Tasmania, *Parliamentary Debates*, Legislative Council 19 November 2014 (V Goodwin).

²⁴⁶ *Ibid.*

²⁴⁷ *Local Government Building & Miscellaneous Provisions) Act 1993* (Tas), s 85.

²⁴⁸ *Local Government Building & Miscellaneous Provisions) Act 1993* (Tas), s 84(1)(a); 'minimum lot' is defined by s 109 of the Act subject to any provision in a planning scheme (which scheme

Under ss 83 and s 85 a council has discretion to refuse approval and is given specific guidance as to the circumstances in which it may exercise its discretion not to approve a subdivision. Section 85 lists a series of factors that entitle a council to refuse to approve a subdivision.

The s 85 list includes some factors that are not referred to in planning schemes. Consequently, the council may determine to refuse the subdivision permit despite the Acceptable Solution or Performance Criteria of the Planning Scheme being present. The circumstances in s 85 include that the council is of the opinion that:

- the roads of the subdivision will not suit the public convenience or not give satisfactory inter-communication with existing roads,
- that the layout should be altered to include or omit alleys and blind roads,
- that the site layout may render the cost of providing electricity or water too expensive; and
- that where ground is higher on one side or the other, wider roads may need to be provided to give reasonable access to both sides.

The Resource Management Planning & Appeal Tribunal (“The *RMAPT*”) and the Supreme Court of Tasmania considered the discretion under s 85 in a series of decisions, the first of which was the *RMPAT* decision of *Smith v Hobart City Council*.²⁴⁹ The decisions and judgments concerned the exercise by the Hobart City Council of its discretion under s 85(a). The Council refused a permit for a subdivision at 502 Mt Nelson Road taking into account the considerations set out in s 85(a). Those considerations were that the roads ‘did not suit the public convenience’ nor did they allow for ‘satisfactory inter-communication’ to the inhabitants of the Hobart City.

The history of the land in the immediate vicinity of the proposed subdivision was

may provide for acceptable solutions or performance criteria in which case sub-s (1) will not apply). See also above, chapter 1, 3.

²⁴⁹ *Smith v Hobart City Council* [2009] TASRMPAT 94

lengthy and complex. One of those pieces of land was 512 Nelson Road.²⁵⁰ Some of the difficulties of the matter were found to derive from earlier planning assessment decisions that had rendered 512 Nelson Road landlocked.²⁵¹ The Council was particularly concerned, in assessing the subdivision proposal for 502 Nelson Road, to provide for public road access to 512 Nelson Road.²⁵²

The *RMPAT* overturned the Council's decision to refuse a permit, prompting an appeal to the Supreme Court and ultimately a decision by the Full Court. The Full Court held that the *RMPAT* position that the Council's refusal was not within power was incorrect and the Tribunal had erred in law. The Full Court then remitted the matter to the *RMPAT* for reconsideration. The Court directed the Tribunal to consider the history of the Council's past planning decisions and the financial consequences of its requirement that 512 Nelson Road be given access to a public road.

Although the subdivision was eventually permitted,²⁵³ the judgment of the Full Court dealt with the argument that the Council did not have power to refuse the subdivision on the basis of the matters provided in s 85. Blow J (as he then was) stated:

There is no doubt that the Council had a discretion to refuse to approve by virtue of the LGBMP Act, S 85(a). There is nothing in the relevant legislation that fetters the exercise of such a discretion.²⁵⁴

More recently, the *RMPAT* has considered the discretion in the context of Public Open Space requirements on subdivision. In *P Barker & A Woolley v Clarence City Council*,²⁵⁵ the Council refused a permit for subdivision on two grounds. The first

²⁵⁰ The history was summarised by Blow J (as he then was) in *Smith v Hobart City Council* [2010] TASFC 9 (21 December 2010) [10].

²⁵¹ The Tribunal referred to the 'ad hocery' of earlier planning decisions in *J & P Smith v Hobart City Council* [2011] TASRMPAT 122 (19 August 2011) [17-18].

²⁵² *Smith v Hobart City Council* [2010] TASFC 9 (21 December 2010) [4].

²⁵³ The decision of the *RMPAT* in *J and P Smith v Hobart City Council* [2012] TASRMPAT 29 (22 February 2012) addresses the schedule of conditions, including those required to address the bushfire risk.

²⁵⁴ *Smith v Hobart City Council* [2010] TASFC 9 (21 December 2010) [20].

²⁵⁵ *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017).

ground was the exercise by the Council of the discretion under s 85(d)(iii) to require alteration to the plan to include Public Open Space. The *RMPAT* noted that under s 85 the decision maker is not constrained by a Council's formal Policy on Public Open Space. The discretion under Part 3 is also not fettered by the legislation.²⁵⁶ The *RMPAT* determined that the discretion must be exercised reasonably under Part 3. In the case before it the *RMPAT* determined that it would not have refused the subdivision on that ground and it was unreasonable for the Council to do so.²⁵⁷

That the discretion granted to Councils under Part 3 is alive and well poses questions for its place in Tasmania's planning system established under *LUPAA*. In *P Barker & A Woolley v Clarence City Council*, the Tribunal noted:

Section 85 of [*Local Government (Building & Miscellaneous Provisions) Act 1993*] confers a power through which subdivision can be regulated independently of the [Planning] Scheme. At its 'bluntest' the power of refusal therein could be exercised repeatedly until an acceptable subdivision application addressing public open space, was submitted.²⁵⁸

The issue of the Part 3 discretion and its interaction with the *LUPAA* system was also considered by those interviewed for this thesis. One senior council infrastructure manager commented on the importance of prescriptive provisions such as s 85 of Part 3.²⁵⁹ He noted they act as a source of enabling power for councils that are required to play multiple roles. Councils must act not only as planning authorities in the assessment of development proposals, but also as risk managers and strategic forward planners for the provision of infrastructure. The powers and discretions granted under Part 3 to Councils were described as 'the backbone of sustainable development' by subdivision,²⁶⁰ and its provisions as essential to the ability of local government to play the roles assigned to it. The

²⁵⁶ *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017) [76].

²⁵⁷ *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017) [78].

²⁵⁸ *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017) [73].

²⁵⁹ Interview with Surveyor 1, 29th September 2016.

²⁶⁰ Interview with Surveyor 1, 29th September 2016.

interviewees who made these comments emphasized the importance of meaningful consultation with local government in any review of Part 3.

Another interviewee predicted that the powers and discretions granted to Councils under Part 3 would become more useful and meaningful to Councils.²⁶¹ He suggested that the planning scheme changes through firstly, the interim planning schemes and now the statewide provisions have meant limitations on their discretion and decision-making power that some Councils are yet to come to terms with. The failure to appreciate the role of Part 3 was also noted by one Council in comment on the provisions of the state-wide planning scheme. It was pointed out that the 'full ambit of general considerations and grounds for refusal under sections 84 and 85...' is not reflected in the scheme leading to the possibility of a challenge for decisions that do not take into account those provisions.²⁶²

Such an argument was presented to the *RMPAT* in *P Barker & A Woolley v Clarence City Council*.²⁶³ The developer challenged the validity of clause 14.5.3 P2 of the Planning Scheme²⁶⁴ on the ground that it purported to remove the discretion granted to the Council under s 85(d)(iii). The Tribunal noted that it did not have legal authority to make a declaration as to the validity of that provision. If it did have such power, it would reject the argument,²⁶⁵ on the grounds that the Scheme should be read as conferring a discretion to make no requirement for open space.²⁶⁶ The Scheme properly applied could accordingly have the effect that the proposed development could 'not be conditioned to require open space.' The Tribunal commented that it might, therefore, be arguable whether the Council technically retained its discretion, but that argument was not one for the Tribunal to determine. The limits of the *RMPAT*

²⁶¹ Interview with Planner 4, 12th October 2016.

²⁶² West Tamar Council, Submission No 260 on *Tasmanian Planning Scheme - draft State Planning Provisions*, 18th May 2016, 2.

²⁶³ *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017).

²⁶⁴ Clause 14.5.3 P2 provides that 'Public Open Space must be provided as land or cash in lieu, in accordance with the relevant policy.'

²⁶⁵ *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017) [18].

²⁶⁶ *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017). [21]

decision leave open the possibility of further challenges to both planning schemes and the Part 3 discretion.

Any study of Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* must take into account its status as the prevailing regulation for subdivision in Tasmania. Despite that legislated status, the research of this thesis suggests that the role and significance played by Part 3 in the planning system is not appreciated. This was confirmed by two of the interviewees spoken to for this thesis who have extensive experience with Tasmania's planning system. They both suggested the significance of Part 3 and its position by virtue of s 122 as the prevailing regulation for subdivision in Tasmania is not widely understood.²⁶⁷

Such lack of understanding and appreciation seems to have affected even those responsible for administering Part 3. Reports submitted by the Department of Primary Industry Water and the Environment as part of the legislative review program under the National Competition Policy record the progress made under that program.²⁶⁸ The report submitted in 1999, noted that there was to be a state-based review of Part 3 during 1999.²⁶⁹ Subsequent reports submitted for the program between May 2000 and March 2005 incorrectly and, rather alarmingly, record that Part 3 had been repealed and replaced by new legislation.²⁷⁰

²⁶⁷ Interviews with Planner 2, 22nd September 2016 and Surveyor 1, 29th September 2016.

²⁶⁸ Tasmanian Government, 'National Competition Policy Progress Report', May 1999

<http://ncp.ncc.gov.au/search/results?searchstring=tasmania&SUBMIT=Search&jurisdiction=TA&doc_type=2&year=§or=&pagesize=10>

²⁶⁹ In interview Surveyor 1, 29th September 2016 referred to a review of Part 3 that was conducted in 1998. The author has been unable to find a record of a report in the State Archives or Parliamentary Library. One state service employee suggested after interview that the review might never have been completed due to the retirement of its chair, a review of departmental priorities or a change in government.

²⁷⁰ eg Tasmanian Government, 'National Competition Policy Progress Report', May 2001, 89.

<<http://ncp.ncc.gov.au/docs/Tasmania%27s%20fifth%20NCP%20progress%20report%20to%2031%20December%202000%2C%20May%202001.pdf>>

Tasmanian Government, 'National Competition Policy Progress Report', May 2005, 66.

<<http://ncp.ncc.gov.au/docs/Tasmania%20ninth%20NCP%20progress%20report%20as%20at%2031%20March%202005%2C%20May%202005.pdf>>

Interviewees spoken to for this thesis referred to the need for better integration of Part 3 and for all regulatory provisions relevant to development assessment to be centralized. Two planning assessors spoke of the complication and confusion that can arise because of the need to take account of the provisions of Part 3 in a system that is focused on *LUPAA* and its planning schemes.²⁷¹

Such a view of Tasmania's planning system is reflected in the 2015 Report Card on development assessment issued by the Property Council of Australia. The Property Council report welcomes the reform to planning schemes as broad scale reform of the system, but does not take into account Part 3.²⁷² Other interviewees suggested that the assessment provisions of Part 3 should be incorporated into *LUPAA* and its planning schemes, with provisions relevant to land titles being transferred to the *Land Titles Act*.²⁷³ For another interviewee, the solution lies in legislation such as the *Subdivision Act 1988* (Vic) that provides a one-stop shop for dealing with the mechanics of putting a subdivision proposal into practice.²⁷⁴

B 'Councils' and Planning Authorities'

The complexity arising from the interaction between the Part 3 prescriptive provisions and the *LUPAA* system is highlighted when considering the distinction between a 'council' under Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* and a 'planning authority' under the *LUPAA* system. Unlike Part 3 that refers to councils, *LUPAA* is focused on planning authorities. A planning authority is defined as meaning a council.²⁷⁵ As a planning authority, a council is charged by *LUPAA* with enforcement of a planning scheme.²⁷⁶

²⁷¹ Interview with Planner 3, 22nd September 2016 and Planner 5, 12th October 2016.

²⁷² Property Council of Australia above n 2, 72.

²⁷³ Interview with Lawyer 1, 19th September 2016, Planner 2, 20th September 2016.

²⁷⁴ Interview with Consultant, 23rd September 2016.

²⁷⁵ *Land Use Planning & Approvals Act 1993*, (Tas), s 3.

²⁷⁶ Under s 63A of *LUPAA* a planning authority must take all reasonable steps to ensure that the provisions of a planning scheme are complied with; s 48 enforcement of pl scheme; s 5 & sch 1.

In exercising its powers under *LUPAA*, a planning authority must seek to promote sustainable development and the objectives of the planning system established under *LUPAA*.²⁷⁷ Section 51 of *LUPAA* prohibits the commencement of use or development that requires a permit unless the authority charged with administering the planning scheme has granted a permit and the permit is in effect.

In its role as planning authority, a council is subject to review by the Resource Management and Planning Appeal Tribunal (the *RMPAT*).²⁷⁸ In making a determination the *RMPAT* can exercise the powers conferred on the person who made the decision.²⁷⁹ The *RMPAT* may affirm, vary or set aside the decision of a planning authority and may substitute a different decision.²⁸⁰ Consequently the *RMPAT* may exercise the discretion of a council acting as planning authority in respect of a subdivision proposal in a way that is contrary to the council's exercise of it.²⁸¹

A review by the *RMPAT* may be triggered by a decision made by a council acting as planning authority pursuant to the powers and discretions granted under *LUPAA* and the *LUPAA* planning schemes. A review by the *RMPAT* may also be triggered by a decision made by a council acting under the powers and discretions granted by the Part 3 assessment system. The review by the *RMPAT* that was the subject of decisions by Porter J at first instance²⁸² and on appeal to the Full Court in *Smith v Hobart City Council*²⁸³ was one such. The review was the result of a decision by the council not to approve a subdivision based on the discretion granted to it under s 85(1)(a) of Part 3.

Nevertheless although the *RMPAT* is placed in the position of the planning

²⁷⁷ *Land Use Planning & Approvals Act 1993*, (Tas), Sch 1.

²⁷⁸ *Land Use Planning & Approvals Act 1993*, (Tas), s 61(3).

²⁷⁹ *Resource Management & Planning Appeal Tribunal Act 1993* (Tas), s 23(1).

²⁸⁰ *Resource Management & Planning Appeal Tribunal Act 1993* (Tas), s 23(2).

²⁸¹ *Resource Management & Planning Appeal Tribunal Act 1993* (Tas), s 23(1). During the 2015-2016 year of 141 planning appeals heard by the *RMPAT*, 19 related to subdivision proposals (figures supplied by the *RMPAT* on request as the *RMPAT* Annual Reports do not provide a break down of appeals lodged under *LUPAA*). <http://www.rmpat.tas.gov.au/annual_reports>

²⁸² *Hobart City Council v Smith* [2010] TASSC 11 (19 March 2010).

²⁸³ *Smith v Hobart City Council* [2010] TASFC 9 (21 December 2010).

authority and is able to exercise its powers and discretions, it cannot require a planning authority to enter an agreement that the planning authority does not want to enter.²⁸⁴ In *A Moon v West Tamar Council*,²⁸⁵ the Council had refused to approve a subdivision. The refusal was based on the Council's finding that the proposal did not adequately address the need for either initial or ongoing risk management of landslip as required by the landslip code.

The Council refused to enter the Part 5 agreement that the *RMPAT* held to be a solution to the risk management issue. That refusal prompted an appeal to Blow CJ who found that the *RMPAT* powers extended to ordering a council to enter into an agreement.²⁸⁶ The Council appealed and the Full Court upheld the appeal.²⁸⁷ The matter was remitted to the *RMPAT* which reiterated what it saw as the sound policy reasons for the Part 5 agreement. Despite those reasons, as the Council refused to enter the Part 5 agreement and as there was no other solution to the management of the landslip risk, the subdivision did not proceed.²⁸⁸ It is consequently clear that although it is a planning authority a council retains its rights as an autonomous entity. As such it retains the freedom based on common law principles to decide whether or not to enter into an agreement.²⁸⁹

There is potential for the relationship between the *RMPAT* and councils acting as planning authorities to be fractious. In a submission reported in *West Tamar Council v RMPAT*, the Solicitor General referred to the possibility when suggesting that a 'politically motivated' council might refuse a development in order to capriciously abrogate the Tribunal's powers.²⁹⁰ Estcourt J rejected the submission. The submission was made in support of argument for an

²⁸⁴ *West Tamar Council v RMPAT* [2015] TASFC 12 (30th September 2015) Estcourt J [54].

²⁸⁵ *A Moon v West Tamar Council* [2014] TASRMPAT 27 (27 October 2014).

²⁸⁶ *West Tamar Council v Resource Management and Appeal Tribunal* [2015] TASSC 32 (23 July 2015), [12].

²⁸⁷ *West Tamar Council v Resource Management and Appeal Tribunal* [2015] TASFC 12 (30 September 2015),

²⁸⁸ *A Moon v West Tamar Council* [2016] TASRMPAT 11 (31/ May 2016).

²⁸⁹ *West Tamar Council v RMPAT* [2015] TASFC 12 (30th September 2015) Estcourt J [54].

²⁹⁰ *West Tamar Council v RMPAT* [2015] TASFC 12 (30th September 2015), [47].

interpretation of s 23(1) of the *RMPAT* Act that would have enabled the *RMPAT* to order the planning authority to enter the Part 5 agreement. The *RMPAT* considered the Part 5 agreement to be an appropriate means of addressing issues arising from landslip risk.

Although a planning authority is a council, a council's role extends beyond acting as planning authority. That has significance for a study of Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act* 1993. Part 3 refers to and gives discretions and powers to councils that they do not possess under the *LUPAA* system. The broader scope of the tasks allotted to councils and the roles they play, bring into focus the interaction of *LUPAA* and Part 3.

The tasks councils are to perform are set out in *Local Government Act* 1993, and are focused on the community they serve. The Government's 2012 report on the role of government expressed in eight points the roles councils play, including:

- enhancing local identity and promoting social cohesion,
- providing strategic planning and leadership; and
- improving a community's economic viability.²⁹¹

The council is to provide for that community's health, safety and welfare, its peace, order, and good government. The council is also to involve and be accountable to the members of that community.²⁹²

The recent Tasmanian Government review of the role of councils referred to the changing nature of that role but emphasized the prime tasks of councils in providing services and promoting the interests of the community they serve.²⁹³

²⁹¹ Department of Premier & Cabinet Tasmania Premiers Local Government Council Phase 1 Final report
<http://www.dpac.tas.gov.au/_data/assets/pdf_file/0016/183040/Phase_1_Final_Report_role_of_Local_Government.pdf>; 8.

²⁹² Section 20 *Local Government Act* 1993; In *Mitchell Hodgetts & Associates Pty Ltd v RMPAT* [2010] TASSC 61 (17 December 2010) Evans J cited s 20(1)(a) of the *Local Government Act* as one of the legislative provisions leading to the conclusion that a planning authority is responsible for land use and planning within its municipal area pursuant to a planning scheme and that the planning authority must seek to further the objectives of the *LUPAA* system. [20]

²⁹³ Department of Premier & Cabinet Tasmania Premiers Local Government Council Oct 2012 discussion paper
<http://www.dpac.tas.gov.au/_data/assets/pdf_file/0004/179608/Discussion_Paper_Role_of_Local_Government.pdf>

Councils were described as ‘...strategic land-use planners who work with communities to create an environment that guides the use of land to balance economic, environmental and social values.’²⁹⁴ The review suggested four key areas for assessment of a council’s performance; those being financial management, asset management, land-use planning, and community satisfaction.²⁹⁵

The distinction between councils acting as such under Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act* and councils acting as planning authorities under the *LUPAA* system raises questions. A senior council planner referred to the distinction when discussing the public open space provisions of Part 3.²⁹⁶ It was suggested that the provisions of Part 3 require that any approval of a subdivision proposal submitted under *LUPAA* should include a statement by the general manager of the council’s position acting as a council (rather than as planning authority), in respect of public open space.²⁹⁷

The distinction also raises questions for the review of decisions under the *LUPAA* system. The *RMPAT* may review the decision of a council on an application for a permit under *LUPAA* that is made on the grounds of matters in s 85. However the status of a decision of a council in respect of a proposal that is not the subject of an application for a permit under *LUPAA* is not so clear. Planners interviewed for this thesis included representatives of one council that has established a pre-assessment procedure for subdivision proposals.²⁹⁸ The process takes place before an application for a permit under *LUPAA* is lodged. The council’s planning and infrastructure staff members make an initial assessment of a subdivision proposal including matters such as details of drainage arrangements, and

²⁹⁴ Department of Premier & Cabinet Tasmania Premiers Local Government Council Final Report report
<http://www.dpac.tas.gov.au/_data/assets/pdf_file/0019/232651/Local_Government_Role_Assessment_-_Final_Report.PDF> August 2014. The report notes that it was prompted by community debate on the ongoing and future roles of councils.

²⁹⁵ Department of Premier & Cabinet Tasmania Premiers Local Government Council Oct 2012 discussion paper, above n 298.

²⁹⁶ *Local Government Building & Miscellaneous Provisions) Act 1993* (Tas), s 116.

²⁹⁷ Interview with Planner 2, 20th September 2016.

²⁹⁸ Interview with Planners 4 and 5, 12th October 2016.

provisions for public open space. The staff acts as the staff of a council as opposed to of a planning authority. A formal application may be lodged under *LUPAA* after the pre-assessment consultation with the council has taken place. Whether such an assessment process would be subject to review by RMPAT has not yet been tested.

V CONCLUSION

It might be assumed that as part of Tasmania's planning system and the prevailing regulation for subdivision, Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act* plays a vital and pivotal role in the regulation of subdivision and makes an effective contribution to the operation of that system. However, the research reported in this chapter indicates there is a lack of integration between Tasmania's prevailing legislation for subdivision and the *LUPAA* system. To the extent that there is incoherence, lack of certainty, and lack of integration in Tasmania's planning system, its effective operation and the success of the current planning reform will be affected. Chapter 5 will further consider the effectiveness of Part 3 as it examines against the background of the elements of effective regulation, the issues raised by interviewees when asked about Part 3.

CHAPTER 5 – HOW EFFECTIVE IS TASMANIA’S SUBDIVISION LEGISLATION?

Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act* is primary legislation and falls at one end of the regulatory spectrum. As a statute enacted by Parliament it is a prescriptive regulatory tool at the command and control end of the spectrum and is the ‘core understanding’ of many people as to what regulation is.²⁹⁹ Such regulation is centred on and enforced by the state with penalties applying in the case of contravention.³⁰⁰ At the other end of the spectrum is regulation based on a ‘decentred analysis’³⁰¹ of regulation as something that is not tied exclusively to the state. Such analysis of regulation has its origins in what has been called ‘the failure of command-and-control regulation.’³⁰²

Command-and-control regulation suffers from limitations inherent in its character as primary legislation. Statutes represent the ‘most rigid [regulatory] implementation technique’³⁰³ with effects that ‘are ongoing and long lasting.’³⁰⁴ Regular review of regulation has been identified as essential to maintaining its effectiveness; monitoring and evaluation enable policy adjustments to be made to keep the regulation relevant.³⁰⁵ Primary legislation risks suffering from rigidity because the process to introduce, draft, amend and repeal it is cumbersome and time consuming. The rigidity of this process is one explanation for the failure to review Part 3; regulation that was intended as a temporary solution to be replaced in the months after its proclamation.

Regulation, if unreviewed, risks becoming ineffective as the regulated lose connection with it. That connection may be lost because regulation may be a disproportionate means of achieving a policy goal, or simply not meet its policy

²⁹⁹ Black, above n 18, 1, 2.

³⁰⁰ Parker and Braithwaite, above n 14, 127 [4].

³⁰¹ Black, above n 18, 1, 2.

³⁰² Wardrop, above n 159, 197, 201.

³⁰³ Australian Law Reform Commission, above n 107, [6.20].

³⁰⁴ *Ibid*, [6.33].

³⁰⁵ Holley and Gunningham, above n 16; Australian Government above n 23, 5.

goal. Regulation should exhibit both ‘proportionality’ and ‘parsimony.’³⁰⁶ It should be no more than is required to meet its objective and no more severe than necessary to achieve its purpose. ‘Good’ regulation involves a relationship and what has been described as a ‘regulatory conversation,’³⁰⁷ between the regulated and the regulator that allows a shared understanding of the problem.³⁰⁸

This understanding can enable the regulator to exercise persuasion or what has been called ‘soft power,’ rather than relying on enforcement by the state.³⁰⁹ For this soft power to be successfully exercised, the community must have a connection to the regulation and see it as legitimate.³¹⁰ It is not sufficient that only the judiciary is able to interpret it. Regulatory legitimacy is dependant on ‘the extent to [which] principal stakeholders and the general public are willing to give it allegiance.’³¹¹

If such connection is absent, or the rules are indeterminate or inflexible, creative compliance can be encouraged.³¹² This occurs where there is technical compliance with the words of a rule but formalism is used to defeat its purpose or policy. Yeung has highlighted this in her distinction between ‘rule compliance’ and ‘substantive compliance,’ and has pointed out that they may not always be coextensive.³¹³

Ineffective regulation results in more than simply failure to meet policy goals. Other consequences are unnecessary financial costs, including those associated with postponement of the policy goal, erosion of confidence in the law and

³⁰⁶ Freiberg, above n 14, 267-268.

³⁰⁷ Braithwaite, above n 188, 71 quoting Julia Black ‘Talking about regulation’ (1998) *Spring Public Law* 77.

³⁰⁸ Freiberg, above n 14, 80-81.

³⁰⁹ Richard Hooper ‘Better regulation’ (2014) *New Zealand Law Journal* 269, 271.

³¹⁰ Julia Black *Rules and regulators* (Clarendon Press 1997) 12-19.

³¹¹ Morgan and Yeung, above n 14, 11.

³¹² Freiberg, above n 14, 262.

³¹³ Morgan and Yeung, above n 14, 152 quoting K Yeung *Securing Compliance* (Hart Publishing 2004) 11.

undermining of other regulation and the law itself.³¹⁴ Poor regulatory design may be the cause of such regulatory failure.³¹⁵ Prescriptive regulation may fail and be ineffective because it is ossified and removed from societal norms and regulation may fail because it invites evasion through loopholes.³¹⁶

The research that is reported in this chapter demonstrates that Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act* suffers from the problems that can afflict command-and-control regulation. The failure to attend to its review or replacement and to integrate it with the LUPAA planning system has been lamented and acknowledged. Interviewees spoken to for this thesis identified problems, including provisions that contain drafting errors or the wording of which is unclear. They also expressed frustration with cumbersome procedures, regulation that is not an efficient or effective means of achieving a policy goal, and that is redundant. This chapter will examine the issues raised by interviewees in the context of regulatory theory as to what it is that makes regulation effective.

I THE LANGUAGE OF PART 3 AND EFFECTIVE REGULATION

When confronted with legislation that contains errors or that is at odds with the intent of Parliament, a Court must give effect to the will of Parliament as expressed in the statute.³¹⁷ That judicial obligation can reduce the effectiveness of the regulation as policy goals may be missed. Unclear language may also contribute to what Braithwaite calls a ‘thicket of rules’ that provide opportunities and ‘sign-posts’ for avoidance.³¹⁸ In addition, if legislation is unclear or obviously incorrect the link between it and society that encourages

³¹⁴ Freiberg, above n 14, 269 citing Organisation for Economic Cooperation and Development, *Comparing Regulatory Systems: Institutions, Processes and Legal Forms in Industrialised Countries* Report (2000) Ch 2.

³¹⁵ Morgan and Yeung, above n 14, 152 quoting K Yeung *Securing Compliance* (Hart Publishing 2004) 11.

³¹⁶ Parker and Braithwaite, above n 14; 127-128.

³¹⁷ *Re Bolton: Ex Parte Beane* (1987) 162 CLR 514; 518; *Clarence City Council v Howlin* [2016] TASSC 61 (21 November 2016) [11].

³¹⁸ Braithwaite, above n 188, 56.

compliance may be weakened. The effectiveness of the regulation will be consequently reduced.³¹⁹

The interviewees spoken to for this thesis identified some of the problems with the language of Part 3. Those problems include provisions that are redundant under the new *LUPAA* system and drafting errors. Some of those errors are of relatively minor effect, and in practice are ignored. They do however demonstrate lack of care in drafting and highlight the lack of review to Part 3.³²⁰

The drafting errors include references in ss 86 and 117 of Part 3 to councils taking certain action before approving a plan of subdivision. The sections should correctly refer to councils taking that action, not before approving a subdivision proposal by issuing a permit, but before finally sealing a plan. Sealing of the plan enables the plan to be lodged with the Land Titles Office. A similar error is apparent in s 90 that incorrectly refers to Division 3 of Part 3. The clause notes to the Local Government (Building & Miscellaneous Provisions) Bill 1993 confirm that s 90 was to be of the same substantive effect as s 483 of the *Local Government Act 1962*. In order for s 90 to have that effect, it must be interpreted to refer to Division 2 of Part 3, not to Division 3.

Of more significance is the wording of s 80 that gives multiple options for the definition of a 'block' or 'block of land' in s 80 of Part 3.³²¹ The clause notes for the Local Government (Building & Miscellaneous Provisions) Bill record the carrying forward of the definitions from the *Local Government Act 1962*. The Notes record that some of the definitions were included for the purposes of simplifying drafting. The multiple definitions raise questions, however.

One provision carries forward s 462(11) of the *Local Government Act 1962*. That provision is s 80(2) of Part 3. The definition of 'block' in s 80(2) excludes land

³¹⁹ Morgan and Yeung, above n 14, 11; Freiberg above n 14, 262.

³²⁰ Planner 2 highlighted some of the drafting errors during interview on 20th September 2016, mentioning them more as a source of irritation than as being of substantive effect, as they are effectively ignored in practice.

³²¹ s 80(1), s 80(2), s 80(3), s 80(4) and s 80(4A) of the *Local Government (Building & Miscellaneous Provisions) Act 1993*.

that is unlikely to be used by a farmer, grazier fruit grower or similar person as the sole source of income. One interviewee with extensive experience commented on that earlier subdivision regulation legislation, Part XVI, Division 2 of the *Local Government Act 1962*. Under that regulation, it was possible outside of proclaimed building areas, to do what he described as ‘your own thing’ as far as subdivision was concerned.³²² The definition of ‘block’ in s 462(11) *Local Government Act 1962* supports that suggestion. The exclusion in s 80(2) of Part 3 suggests that rural land is not to be the subject of subdivision control. Such a provision is at odds with, and is redundant under the *LUPAA* system as subdivision controls clearly apply to rural land.

Section 109 is another redundant provision. The section was highlighted in chapter 1 as a section that is redundant, but remains. The building areas it refers to are no longer a relevant means of classifying land. The prescriptive standards it sets are at odds with the performance-based standards of more recent *LUPAA* planning schemes.

A Adhesion Orders

This section considers the Part 3 provisions that provide for adhesion of multiple blocks of land. Adhesion does not fall within the definition of subdivision.³²³ Nevertheless, the wording of s 110 of Part 3 that provides for Adhesion Orders is an example of the difficulties caused by the language of Part 3 that detract from its effectiveness. The limits of the provisions also highlight the lack of a cost-effective means in Tasmania’s planning and land administration system of joining multiple blocks of land.³²⁴

³²² Interview with Consultant 23rd September 2016.

³²³ S 81(e) *Local Government (Building & Miscellaneous Provisions) Act 1993*.
– definition of ‘subdivide’ excludes ‘an order adhering existing parcels of land’.

³²⁴ The definition of ‘subdivide’ in Part 3 includes what is thought of as a mere boundary adjustment. The distinction between a boundary adjustment and a full-scale subdivision lies in whether or not the proposal involves the reconfiguration of lots or the creation of new lots. (*Break O Day Council v RMPAT* [2009] TASSC 59 (4 August 2009) following *Ousley Pty Ltd v Warraingah Shire Council (No 2)* (1999) 104 LEC 250; *McCabe v Blue Mountains City Council* [2006] NSW LEC 176; see also *GD & D Adams v Huon Valley Council* [2011] TASRMPAT 45 (12 April 2011). Boundary adjustments will follow a permitted pathway. Nevertheless the planning authority must check the development to confirm it is in fact permitted and must determine

Under s 3 of *LUPAA*, subdivision and consolidation are included in the definition of ‘development’ meaning that any such proposal must be submitted to a planning authority for assessment. Section 110 of Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* provides a mechanism for joining multiple lots of land on the Land Titles Register, without the need to comply with the *LUPAA* development assessment process. However, the difficulties presented by the language of s 110 prevent it from being a cost effective and efficient solution.

Interviewees on both sides of the fence (those acting in the interests of developers and those acting to regulate and assess development) emphasised the need for such a solution. The joining of multiple blocks of land is frequently a condition of planning permits for development. The lack of a simple and efficient means of achieving that detracts from the effectiveness of Tasmania’s planning provisions. The lack of such a procedure means that any proposal to join multiple blocks of land must be submitted to planning assessment.

Adhesion Orders also offer a cost-effective means by which land, the description of which is derived from the words of a general law deed, may be joined to the title records of land held under the Torrens system.³²⁵ On conversion from general law, a parcel of land may be noted on plan records as ‘sketch by way of illustration only.’ Such a notation means that the parcel has not been the subject of survey. The plan has been drawn from an interpretation of the meets and bounds description of a general law deed. A full survey will be required to join such a piece of land with commonly-owned adjacent land, unless an Adhesion Order can be used. In the case of rural land, where one parcel may be several hundreds of hectares in area, the cost of such a survey is prohibitive.

whether any permit conditions are required to address issues such as environmental or engineering considerations.

³²⁵ This issue was raised during interview with Surveyor 2, 11th October 2016.

A council may make an Adhesion Order under s 110 of Part 3. In the absence of a development permit for consolidation, Adhesion Orders offer a relatively inexpensive and quick alternative. However, the section suffers from language that is obscure and imprecise and the effect of the Orders is unclear. Interviewees consistently raised s 110 as a significant problem as the wording of the section preventing its being used as a cost effective means of joining two or more blocks of land.

An Adhesion Order may be made if a block:

- (a) has the qualities of a minimum lot; and
- (b) consists of two or more parcels that may, without the approval of any plan by the council, lawfully be sold separately so as to create a block which
 - (i) would not have the qualities of a minimum lot; and
 - (ii) that the council believes is likely to be built on or bought for building.³²⁶

That extract from s 110(1) highlights some of the issues raised by the language of s 110. The language is difficult to interpret but seems to mean that the Order may only be made firstly, if each of the joined parcels is a sub-minimum lot. Such lots are lots that do not meet the minimum requirements in terms of qualities such as area or frontage. Secondly the section seems to mean that the block that results from joining them must be likely to be used for building. If that interpretation is correct the circumstances in which Adhesion may be made are necessarily limited.

The effect of an Order is that one folio of the Register will be issued and:

....the parcels comprised in the block subject to the order are not to be dealt with so that they come into the possession of different persons for

³²⁶ S 110 (1) *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas).

an estate of freehold or at law or in equity for a term at law or in equity of 3 years or more.³²⁷

One of the questions asked of interviewees for this thesis was their understanding of those words, their effect and why they were chosen.³²⁸ The typical response was a mystified one, although one interviewee suggested the reference to 3 years might be related to s 64(2) *Land Titles Act 1980* (Tas).³²⁹

The difficulties of s 110 are immediately apparent from even a cursory perusal of its wording. One local government planner referred to the ‘nightmare’ of s 110.³³⁰ He noted that he finds himself feeling confident in an interpretation one week, only to find himself revising his opinion the next week.

One surveyor noted that some councils in the north of the state are reluctant to make Adhesion Orders.³³¹ This reluctance has its origins in a situation that reflects the peculiarities that are typical of the ‘paradox’ that is Tasmania.³³² The reluctance seems to stem from a legal opinion known to many of the northern councils that refers to the proviso in sub s 2(b). The words state that an Adhesion Order cannot be made if the parcels have ‘at any time been owned separately by persons who did not then own adjoining land.’

A council may discharge an Adhesion Order.³³³ One planner noted that his reluctance to recommend the making of an Adhesion Order stemmed from his experience when the Recorder of Titles revoked an Adhesion Order without reference to the council that had made it.³³⁴ The result was of some concern to

³²⁷ S 110(4) *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas).

³²⁸ Section 110 repeats the wording of s 477A of the *Local Government Act 1962*. Hansard records did not exist in Tasmania until 1979 and the author has been unable to find any official record of why s 477A was introduced into the *Local Government Act 1962* in 1963 or why its wording is as it is.

³²⁹ S 64(2) *Land Titles Act 1980* (Tas) provides that a lease of less than 3 years is not registrable.

³³⁰ Interview with Planner 1, 20th September 2016.

³³¹ Interview with Surveyor 2, 11th October 2016.

³³² Castles and Stratford, above n 73.

³³³ S 110 (11) *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas).

³³⁴ Interview with Planner 4, 12th October 2016.

the council as one parcel on which wastewater and sewerage infrastructure for a dwelling was located was subsequently sold, despite the fact that the dwelling itself was on the other.³³⁵

Adhesion Orders do serve a useful purpose as development control tools for councils to ensure that building proposals that straddle boundaries are located on land that is one folio of the Register. One planner noted that due to the lack of any other simple mechanism for joining multiple parcels of land, Adhesion Orders have been increasingly sought by land-owners looking to avoid the necessity of a development application.³³⁶ Unfortunately the difficulties with the language of s 110 prevent its being an effective regulatory solution.

A review of the statutory provisions for joining blocks of land is needed. Such a review could take into account provisions of other jurisdictions, including s 223LJ *Real Property Act 1886* (SA). That section provides a method of amalgamating blocks by application to the Registrar-General with the consent of the mortgagee and any other person the Registrar-General deems appropriate (which may, but need not, include a council).

B *Public Open Space*

Part 3 provisions relating to public open space suffer similarly from ineffectiveness due to their imprecise wording and difficult language. In a 2012 thesis, Indra Boss has highlighted the importance of public open space as a planning tool, and stressed the need for Australian planners to see it as 'critical infrastructure rather than an afterthought.'³³⁷ In referring to planning literature citing public open space as a non-renewable resource, she stresses the need for adequate supply,³³⁸ and the increasing pressure on local governments to deliver environmentally sustainable development.³³⁹

³³⁵ Without detail as to the reason for the revocation it has not been possible to check the legitimacy of such action by the Recorder of Titles.

³³⁶ Interview with Planner 2, 20th September 2016.

³³⁷ Boss, above n 11, 19.

³³⁸ Ibid, 20.

³³⁹ Ibid, 24.

Boss interviewed both council and non-council staff all of whom were involved in varying degrees in planning for, or management of, urban open space in Hobart. The interviews centred on four themes, one of which was the legislative constraints on the delivery of quality public open space. The frustration of those interviewed with the provisions of Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) is evident in the quotes reproduced in the thesis. References are made to:

- legislative provisions that ‘date from the ark’;
- the weaknesses in the provisions as to valuation; and
- the arbitrariness of the amount of cash in lieu that may be claimed.³⁴⁰

The thesis reports strategies adopted by councils in attempts to overcome the problems. Those strategies include:

- Councils refusing offerings of ‘poor’ land;
- imposition of conditions requiring that certain areas of land be set aside; and
- strategic land purchase by councils as part of an open space strategy.³⁴¹

The thesis discussion concludes that the current governance arrangements are unlikely to ensure that sufficient open space will be delivered.³⁴² The primary reason given for that conclusion is the inadequacy of the legislative framework.³⁴³ That governance framework includes the *LUPAA* system and Part 3.

Part 3 provides for public open space in the context of new subdivision developments. The research of this thesis supports the conclusion of Boss’ thesis.

³⁴⁰ Ibid, 51.

³⁴¹ Ibid 51-52.

³⁴² Ibid, 86.

³⁴³ Ibid.

The provisions of Part 3 that relate to public open space were a common theme of interviews and a source of concern for both those acting for developers,³⁴⁴ and council staff required to assess subdivision proposals. One interviewee summed up the sentiments of interviewees when he referred to the public open space provisions of Part 3 as a ‘thorn.’³⁴⁵ Those provisions are s 83, s 116 and s 117. Section 85 also applies to the question of public open space. The discretion under sub-s (d)(iii) enables a Council to refuse permission on the grounds the proposal should be altered to include or omit public open space.

In contrast to the provisions of some other jurisdictions,³⁴⁶ Part 3 does not specify the circumstances in which a council may require public open space to be provided. Section 83(1) simply provides that a council may require land to be sold to it for nominal consideration. The section is expressed to be subject to s 116 that provides that a council must pay for land if the value of it exceeds one-twentieth of the whole area in the subdivision. The value of the land is to be taken at the date of lodgment of the plan.³⁴⁷ Sections 116 and 117 do not make it clear whether the value to be applied is the improved or unimproved value.³⁴⁸

The imprecision of the language causes other difficulties. One interviewee outlined some of the problems from the perspective of developers.³⁴⁹ Due to the lack of detail in the legislation different councils adopt different approaches. Councils have different requirements as to when they will require public open space or cash-in-lieu to be provided, and how the amount of any such cash-in-lieu is calculated.³⁵⁰

³⁴⁴ In Tasmania subdivision proposals are most often made by surveyors acting on behalf of developers.

³⁴⁵ Interview with Consultant, 23rd September 2016.

³⁴⁶ Eg *Environmental Planning & Assessment Act 1979* (NSW) s 7.11 that links the dedication of land or the payment of a monetary contribution to increase in demand for public amenities or public services as a result of the subdivision; similarly *Subdivision Act 1988* (Vic) s 18.

³⁴⁷ *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) s 116(6).

³⁴⁸ *West Tamar Council v Phillips* [2013] TASSC 16 (10th May 2013) [7].

³⁴⁹ Interview with Surveyor 2, 11th October 2016.

³⁵⁰ During interview Surveyor 2 provided redacted copies of permits issued by various councils noting the different methods of calculating and valuing public open space cash-in-lieu contributions. Some councils, concerned to promote development do not routinely require public open space contributions.

Some of the highlighted issues were that some councils require public open space or cash-in-lieu payments for every subdivision proposal, while some do not. Some councils levy the cash-in-lieu payment on each successive subdivision that may occur of the initial block. Some councils require public open space or cash-in-lieu in respect of land zoned commercial or industrial where the public would gain little benefit from the dedication or payment. The lack of detail as to the valuation means that cash-in-lieu may be required despite a developer bearing additional costs such as those associated with playgrounds and landscaping. Different councils adopt different approaches to valuation methods, with consequent difficulties of preparing subdivision proposals and predicting results.

On the other side of the debate, council staff similarly expressed frustration. One concern is that land offered for public open space may be the least valuable and desirable. Councils are consequently left with odd pieces of land that are of little use or benefit to the public. One council's manager noted his council's preference for cash-in-lieu payments as a result.³⁵¹ The accumulation of odd pieces of land has led to one council investigating the possibility of, and commencing, the process of selling such oddments of land under the sale of public land provisions of the *Local Government Act 1993*.³⁵² In some cases, a council planner may prefer to impose conditions such as to the provisions of innovative street-scaping rather than requiring either dedication of land or cash-in-lieu.³⁵³

The lack of guidance for councils as to their obligations in respect of cash-in-lieu payments under the legislation was noted as a problem for council managers.³⁵⁴ Section 117(6) provides that a council must hold any cash-in-lieu amounts 'on trust for the acquisition or improvement of land for public open space.' The amounts are to be applied in accordance with any 'prescribed requirements.'

³⁵¹ Interview Planner 1, 20th September 2016.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ In this respect the Part 3 provisions may be contrasted with those of the *Subdivision Act 1988* (Vic) ss 18-20.

There are no prescribed requirements although the Second Reading Speech referred to the intended regulations that would act as a safeguard.³⁵⁵

Under those intended regulations councils would be required to:

- identify the locality from which funds had been raised;
- assess the extent and condition of public open space and recreational facilities in that locality; and
- consult with the residents of that locality.

The factors that were to be covered in the regulations were similar to those suggested by one of the interviewees as the desirable detail that would assist councils.³⁵⁶

As no regulations have been proclaimed, the use to which any cash-in-lieu payment is to be put is broadly stated as 'being for the benefit of the inhabitants of the municipal area.'³⁵⁷ One interviewee noted that the lack of guidance means that councils have over the years accumulated significant sums that are in some cases held in general revenue accounts with no policy or plan as to how they are to be used or accounted for.³⁵⁸ Another interviewee noted that one council had for some years adopted a policy of not requiring payment of cash-in-lieu because of the potential for liability as a result of the imprecision of the words of s 117(5) and s 117(6).³⁵⁹

In *P Barker & A Woolley v Clarence City Council*³⁶⁰ the *RMPAT* considered the issue of the Council's policy to require open space as a matter of course in respect of any subdivision. The *RMPAT* stated that such an approach was incorrect, as a council is not permitted to make public open space mandatory or

³⁵⁵ Tasmania, *Parliamentary Debates*, Legislative Council, 1 December 1993, 5391, (P McKay).

³⁵⁶ Interview Planner 5, 12th October 2016.

³⁵⁷ *Local Government (Building & Miscellaneous Provisions) Act 1993* s 117(5).

³⁵⁸ Interview Planner 4, 12th October 2016.

³⁵⁹ Interview Surveyor 1, 29th September 2016; that caution was perhaps justified. The Second Reading speech for Part 3 (Tasmania, *Parliamentary Debates*, House of Assembly, 19 October 1993, 6017 (TJ Cleary) noted that it was to be an answer to a problem under which approximately \$1.4 Million of cash-in-lieu payments had been collected by councils on the basis of legislative authority that was subsequently found to be doubtful.

³⁶⁰ *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017).

to require cash in lieu in respect of every subdivision proposal.³⁶¹ The Tribunal's approach to the discretion under s 85 was to find that although the council had a discretion, it should be exercised reasonably and fairly relate to the development. The *RMPAT* held that applying the discretion under s 85, the test to apply in determining public open space requirements is 'inextricably linked to the demand created by the development.'

It is evident that there are significant problems with the provisions for public open space in Tasmania's subdivision legislation. Those problems detract from its effectiveness as a means of achieving the policy goal set for that regulation. Those working regularly with the legislation expressed concern at continued failure to address the problems of the wording of the sections and the failure to implement appropriate strategies for open space.³⁶² There is clearly a need for a review of both the policy underlying the provisions of Part 3 and of their wording. The provisions exhibit the elements and consequences of ineffective regulation.

The language is unclear and imprecise leading to inefficiencies, additional cost and frustration at the lack of guidance. That the potential conflict between the discretion granted under s 85 and the provisions of planning schemes has to be addressed by appeal to the *RMPAT* is evidence of the uncertainty that results from the legislative provisions. The policy goal is missed, as the legislation fails to provide an effective means of providing what is recognised as a valuable asset for urban environments.

The comments of interviewees demonstrate how regulation can be ineffective as it causes frustration that weakens the connection between the regulated and the regulation. Such connection encourages respect for the law and compliance.³⁶³ If respect is not paid by the regulated to the regulation, the ability of councils as

³⁶¹ *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017) [66]-[77] applying *Bunnings Properties Pty Ltd v Kingston CC* [2013] VCAT 1257, [26] re s 18 *Subdivision Act 1988* (Vic).

³⁶² This concern was echoed by the Local Government Association of Tasmania in its submission on the proposed state-wide planning provisions, above n 10, 7.

³⁶³ Morgan and Yeung quoting K Yeung above n 313.

regulators to exercise what has been referred to as ‘soft power’³⁶⁴ that derives from a shared understanding of the problems associated with and the benefits of the provision of public open space, is limited.

This thesis echoes the conclusion reached by Boss’ thesis. There is obviously a need for review and reform of the public open space provisions: ‘There just needs to be a commitment to act!’³⁶⁵

II PART 3 AND THE LAND REGISTRATION SYSTEM

Effective regulation is efficient and cost-effective and it is a relevant and proportionate means of achieving a policy goal.³⁶⁶ The task of subdivision regulation is complicated by the fact that it must not only provide for and interact with the planning and assessment system, it must also interact with the land registration system. Subdivision inevitably affects interests in land.

Interviewees highlighted two provisions of Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) that interact with the land registration system as being cause for frustration. Those provisions were s 95 and s 103. Section 95 deals with the dedication of land for new roadways. Section 103 establishes a procedure for the removal of covenants and easements created on registration of a sealed plan of subdivision. Section 95 was highlighted due to the difficulty that results because the fee simple in roadways does not vest automatically in councils. Section 103 was highlighted because of the cumbersome procedure required to remove redundant covenants and easements. The cost of the procedure, both in terms of money and time, discourages developers to undertake such removal.

As effective regulation, Part 3 should facilitate subdivision that meets the sustainable development policy goal that underlies Tasmania’s planning system. That provisions of Tasmania’s subdivision legislation establish cumbersome procedures, are the cause of frustration and discourage development that fits

³⁶⁴ Hooper above n 309.

³⁶⁵ Boss, above n 11, 87.

³⁶⁶ Freiberg above n 14; Gunningham & Grabosky above n 14; Parker & Braithwaite above n 14.

within the planning assessment system, points to the need for review and reform.

A *Road title provisions*

Section 95 of Part 3 provides for the dedication of new public roads, referred to as highways, on registration of a subdivision plan. It should be noted that other provisions relevant to such roadways, including the process of opening and closing them, removal of trees, recovery of repair costs, bridges, and security that a council may require a landowner to provide for highway works, are in the *Local Government (Highways) Act 1993*. One interviewee pointed out that it would make sense to have all provisions relevant to such roadways consolidated in one piece of legislation.³⁶⁷

Legislation of some other Australian jurisdictions provides for automatic vesting of the fee simple in public roadways in the highway authority on registration of a plan of subdivision.³⁶⁸ Part 3 provides for the dedication of roadways to the public which means that the fee simple of a roadway is not automatically vested in a council on registration of a subdivision plan.³⁶⁹ That Tasmania's legislation is out-of-step with the development of legislation of other states is highlighted by Peter Butt's comments on dedication. He comments that dedication has its origins in common law, and that in New South Wales the change to the statutory vesting of the fee simple occurred under the *Local Government Act 1919* (NSW)³⁷⁰

Dedication does not alter the ownership of the land underlying the roadway.³⁷¹ The highway authority has the right to perform works or to take action necessary for the use of the land as a highway, but the owner of the land retains the right to use the land in ways that do not interfere with the use of the land as a

³⁶⁷ Interview with Planner 2, 20th September 2016.

³⁶⁸ *Roads Act 1993* (NSW) s 145; *Real Property Act 1886* (SA) s 223 LF; *Subdivision Act 1988* (Vic) s 24.

³⁶⁹ G.J Donnelly Senior District Surveyor Department of Main Roads, Tasmania 'Highways in Tasmania' (1985); article reviewed and updated with permission by J VanderNiet, Office of the Surveyor General Tasmania (2010), 6.

³⁷⁰ Peter Butt *Land Law*, (Law Book Co, 6th Ed 2009) 32, [2.43].

³⁷¹ Donnelly above n 369; 5.

highway.³⁷² The authorities for this proposition include the House of Lords in *Tunbridge Wells Corporation v Baird* and Collins MR in *Finchley Electric Light Company v Finchley Urban Council*.³⁷³ These cases are discussed in more detail below.

This state of affairs has caused problems in Tasmania as formal transfers of the fee simple in roads on subdivision plans have been forgotten. The result is that roads intended to be for the benefit of the public, and whether made up or not, may be registered in deceased estates or deregistered companies, mortgaged to financial institutions, or sold.³⁷⁴ The resulting process of amending title records or dealing with the land is prohibitively costly in terms of both time and money. Councils have addressed the issue by making it a condition of a subdivision permit that an executed transfer of the roadway is provided on submission of the subdivision plan for sealing by a council. This raises practical issues, including the necessity of arranging a discharge of a mortgage of the roadway land.³⁷⁵

The road titles provisions of Part 3 have been described as creating ‘an anomaly at law.’³⁷⁶ The effect of s 95 is, nevertheless, consistent with s 111 of the *Land Titles Act 1980*.³⁷⁷ The two statutory provisions are, however, inconsistent with the practice of registering councils as proprietors of road land, and of councils closing unused roads and transferring title to that roadway land.³⁷⁸ The provisions seem to be an example of out-dated policy that is in need of review. The argument for review of these provisions is reinforced on examination of the clause notes for the Land Titles Bill 1980 and the English case law referred to above.

³⁷² Ibid, 5.

³⁷³ *Tunbridge Wells Corporation v Baird* [1986] AC 434 and *Finchley Electric Light Company v Finchley Urban Council* [1903] 1 Ch 437. Both decisions were referred to as authority in the clauses notes to the Land Titles Bill 1980.

³⁷⁴ Interview with Consultant, 23rd September 2016.

³⁷⁵ See by contrast *Subdivision Act 1988* (Vic), S 24(2)(b).

³⁷⁶ Donnelly, above n 369, 6.

³⁷⁷ This link was pointed out during interview with a state service employee on 29th September 2016.

³⁷⁸ In interview, Consultant 23rd September 2016, referred to advice he had given in such a scenario when outlining the problems that arise as a result of the failure to automatically vest the fee simple.

Section 111 of the *Land Titles Act 1980* provides as follows:

Where by any Act a highway is vested in a highway authority which is not the proprietor of the land lying under the highway, the highway authority shall not be registered under this Act as proprietor of the highway, and this Act shall not apply to any extension, diminution, or transfer of the estate of that authority in the highway.

The clause notes for clause 111 of the Land Titles Bill 1980 (now section 111), are that it reproduces s 28A of the *Real Property Act 1886*.³⁷⁹ The clause notes record that in many instances in Tasmania the highway authority does not own the soil under a roadway. The recorded purpose of clause 111 was to forbid registration of title to the roadway because such registration was unnecessary and because '[h]ighways are not articles of commerce.' The English cases cited as authority for the inclusion of clause 111 in the Land Titles Bill (*Tunbridge Wells Corporation v Baird* and Collins MR in *Finchley Electric Light Company v Finchley Urban Council*) raise the question whether they are appropriately cited for the proposition made in the clause notes. A second and more fundamental question is why Tasmanian subdivision legislation cannot do as the legislation of other jurisdictions does (referred to earlier in this chapter), and enable the automatic vesting of the fee simple in the council or highway authority.

The two English cases deal with situations where highway authorities were vested with rights in respect of highway land by statute. The judgments resolved issues arising from the assertion by the highway authorities of rights in excess of those resulting from the dedication of the land as highway. Collins MR noted that the dedication of the highway in the authority had nothing to do with the title.³⁸⁰ All that the dedication provisions did, and were designed to do was determine how much of the physical property of the street would be vested in the authority.

³⁷⁹ Section 28A was added to the *Real Property Act 1886* (Tas) by the *Highways Act* No 83 of 1951.

³⁸⁰ *Finchley Electric Light Company v Finchley Urban Council* [1903] 1 Ch 437; 444.

In *Tunbridge Wells Corporation v Baird*,³⁸¹ the authority sought to rely (unsuccessfully) on the statutory dedication, to construct underground lavatories and conveniences. The House of Lords determined that such use went beyond the ordinary use of the street as a street that was contemplated by the statutory dedication.³⁸² Lord Halsbury, with whom Lords Herschell and MacNaghten agreed, felt justified in giving the matter 'very short treatment.'³⁸³ They rejected the contention on behalf of the authority that the dedication vested the subsoil in the authority.

The conclusion is inescapable that the provisions for road titles under Part 3 and s 111 *Land Titles Act 1980* are ineffective regulation and should be reviewed. The English case law on which s 111 is based limits the powers of councils. Councils are required to provide for infrastructure (such as storm-water drainage) that passes beyond what is necessary for the use of a roadway as a roadway. That the provisions are not in practice complied with highlights their ineffectiveness as they fail to provide the solution to the issue of public roadways created on a subdivision that is required. Councils are in fact registered as proprietors of Torrens system land that is roadway in a subdivision, and are permitted to transfer such land under that system. Congruence between a rule and its purpose is a characteristic of effective regulation.³⁸⁴ There is a substantial gap between Tasmania's road titles provisions and their purpose that highlights the ineffectiveness of the provisions.

B Covenants and Easements

The provisions of Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* that address the issues arising from covenants and easements created on registration of a subdivision plan also demonstrate the characteristics of ineffective regulation. Private restrictive covenants on land may provide for matters such as a limit on the number of lots that can be created, the number of

³⁸¹ *Tunbridge Wells Corporation v Baird* [1896] AC 434.

³⁸² *Tunbridge Wells Corporation v Baird* [1896] AC 434; 439.

³⁸³ *Tunbridge Wells Corporation v Baird* [1896] AC 434; 440.

³⁸⁴ Black quoted by Morgan & Yeung above n 151.

dwellings to be built on a block of land, or confine land to a particular use.³⁸⁵ As such covenants are the result of private agreement and commercial judgment they may be inconsistent with planning policies.³⁸⁶ They may be decades old and the restrictions out-dated.³⁸⁷ Subdivision of land may render the wording of the covenants insufficiently clear to be enforceable and subdivision of the benefited land may also render the covenant unenforceable.³⁸⁸ Australian jurisdictions deal with covenants and the issues they raise in different ways and writers have highlighted the need for reform and consistency.³⁸⁹ In Tasmania, restrictive covenants are noted on the Register and will run with the land if certain conditions are fulfilled.³⁹⁰

Part 3 provides that a sealed plan of subdivision must refer to all the easements and covenants affecting the land and the interaction of Part 3 with the *Land Titles Act 1980* enables the covenant to run with the land.³⁹¹ Covenants are then noted on title records. That notation means that the terms of the covenant and any reservation of power in the developer to modify the effect of the covenant or to release land from the burden of the covenant are available to someone searching the register.³⁹² The enforceability of covenants is determined by equitable

³⁸⁵ Private restrictive covenants are distinguished from covenants in gross, which although they run with land do not benefit a dominant tenement, but instead benefit the Crown, or a local or public authority. Covenant in gross is defined by s 90AB *Conveyancing and Law of Property Act 1884* (Tas).

³⁸⁶ Covenants that restrict the number of lots or dwellings may conflict with policies designed to encourage in-fill urban development as opposed to urban sprawl.

³⁸⁷ Victorian Law Reform Commission, *Easements and Covenants*, Final Report No 22 (2010) 105, 7.91; Western Australian Law Reform Commission, *Restrictive Covenants*, Final Report No 91 (1997) 72, [5.23].

³⁸⁸ Christopher Conolly, 'Consequence of Subdivision for registered easements and covenants', March 2011 *Law Society Journal* 54 (NSW).

³⁸⁹ Sharon Christensen and WD Duncan 'Is it time for national review of the Torrens system? – the eccentric position of private restrictive covenants' (2005) 12 *Australian Property Law Journal* 104.

³⁹⁰ S 102 *Land Titles Act 1980* (Tas); see also Adrian J Bradbrook and Susan V MacCallum, Bradbrook and Neave's *Easements and Restrictive Covenants* (Lexis Nexis Butterworths, 3rd ed 2011) 467, [17.38].

³⁹¹ *Local Government (Building & Miscellaneous Provisions) Act 1993* ss 88, 99; *Land Titles Act 1980* s 102(2)(b).

³⁹² *Land Titles Act 1980* s 102(3); *Clarke v Burnie City Council* [2008] TASSC 75 (26 November 2008), [7].

principles meaning that considerations such as hardship and the balance of convenience may be taken into account.³⁹³

Tasmanian planners interviewed for this thesis indicated that (if aware of them), they routinely advise a developer that land is subject to a covenant.³⁹⁴ In order to be aware, a planner must be provided with a copy of title documents that not only disclose a covenant but also details of the covenant. Development assessment decisions are, nevertheless, made independently of the covenant terms on the grounds that enforcement of the covenant is a matter between the owner of the land subject to the covenant and the owner of the land that benefits. Planning authorities do take account of covenants as a permit to subdivide may be subject to a condition that no covenants be included unless previously approved by the planning authority.

The Schedule of Easements to be created pursuant to s 87 of Part 3 must record all covenants, all existing easements, and all easements created to benefit a lot on the plan of subdivision.³⁹⁵ The easements in the schedule will be recorded on the new titles created on registration of the approved and sealed plan.³⁹⁶ Easements registered on title records can restrict the use to which land can be put and the development that can be undertaken. Redundant pipeline and drainage easements, in particular, may render a piece of land useless as far as development is concerned.³⁹⁷ Layers of easements may be the result, as they must be carried forward on successive sealed plans creating plans that are confusing, complicated, and difficult to interpret.³⁹⁸

The problem has been compounded in Tasmania since the introduction of a separate entity, TasWater, responsible for the provision of water and sewerage

³⁹³ Bradbrook and MacCallum, above n 390, 505, [18.31].

³⁹⁴ Interviews with Planners 1 & 2, 20th September 2016.

³⁹⁵ The requirements of the Recorder of Titles are noted at <<http://dpipwe.tas.gov.au/land-tasmania/land-titles-office/plan-documentation/plan-registration-guidelines#EasementsonPlans>>

³⁹⁶ *Local Government (Building & Miscellaneous Provisions) Act 1993* s 99.

³⁹⁷ Interview Planner 1 20th September 2016.

³⁹⁸ Interview Surveyor 2 11th October 2016.

services.³⁹⁹ On receipt of a planning application that will affect demand for water services or increase the amount of sewage in a sewerage infrastructure system, the planning authority must invite a submission from TasWater as to its requirements.⁴⁰⁰ The authority must take those requirements into account in making a decision on the application.⁴⁰¹ TasWater stipulates its requirements for the width and terms of easements that are for its benefit. In many cases, these relatively new requirements do not match the previous standard form of easements.⁴⁰²

Land may be exempted from covenants and easements through waiver, release, modification, or exemption by the subdivider or vendor of land. Blow J (as he then was) considered the question of the ability to exempt or release land from covenants in *Clarke v Burnie City Council*.⁴⁰³ His Honour noted that although the *Local Government Act 1962* (and now Part 3) permits the recording of covenants, the legislation is silent as to whether a developer may reserve the right to exempt or release lots from a covenant.⁴⁰⁴ The power to remove or exempt land from covenants exists at general law.⁴⁰⁵ As Parliament apparently gave no thought to the issue of the power when enacting the 1962 Act, the legislation should be interpreted as enabling such removal or variation.⁴⁰⁶ This solution seems to be dependant on the subdivider reserving a power to vary or exempt land from covenants and then validly exercising it.⁴⁰⁷

³⁹⁹ Water and sewerage services were divested from councils and vested in three water and sewerage entities under *Water & Sewerage Industry Act 2008* (Tas); the three regional entities have now been replaced with one The Tasmanian Water & Sewerage Corporation Ltd – with effect from 1st July 2013.

⁴⁰⁰ *Water & Sewerage Industry Act 2008* (Tas) s 560.

⁴⁰¹ *Water & Sewerage Industry Act 2008* (Tas) s 560-56Q.

⁴⁰² Interview Surveyor 2 11th October 2016 who noted that drainage and pipeline easements have for decades been noted as a standard 2 metres wide; Taswater requires such easements to be at least 2.5 metres.

⁴⁰³ *Clarke v Burnie City Council* [2008] TASSC 75 (26 November 2008).

⁴⁰⁴ *Clarke v Burnie City Council* [2008] TASSC 75 (26 November 2008) [12].

⁴⁰⁵ *Clarke v Burnie City Council* [2008] TASSC 75 (26 November 2008), [18].

⁴⁰⁶ The legislation referred to being *Local Government Act 1962* s 464(17) and *Local Government (Building & Miscellaneous Provisions) Act 1993* ss 103, 104.

⁴⁰⁷ *Clarke v Burnie City Council* [2008] TASSC 75 (26 November 2008) [4], [20], [27].

Covenants and easements may also be removed by application to the Recorder of Titles under s 84C(1)(b) of the *Conveyancing and Law of Property Act 1884*, or by agreement and release under s 108 *Land Titles Act 1980*. Part 3 provides the only mechanism for the removal of covenants and easements that have been created by a sealed plan of subdivision. Section 103 enables a council to make an amendment to a sealed plan and the process can be used to remove redundant easements or covenants if created by that sealed plan.

There are however difficulties with the process and limits on the powers that a council may exercise. The problems with the available remedies render the cost prohibitive and impossible to recommend to developer clients.⁴⁰⁸ Notice must be given to all parties with an interest in the land subject to the plan as such land might be affected by the removal of the covenant or easement. In large subdivisions notice must be given to all of the lot owners and their mortgagees, and if a lot has been divided to the owners of the new lots. The process of petitioning council can be cumbersome and unwieldy if large numbers of people need to be served and proof provided of the service.⁴⁰⁹

Under s 103, the council may decide to amend a sealed plan of its own motion or may do so on presentation of a petition. The council cannot make a decision on an application to amend the plan or to remove the covenants for at least 28 days and if anyone has objected to the removal, the council must then set a date for a hearing.⁴¹⁰ Interviewees noted the lack of guidance in the legislation as to how hearings should be conducted and that there are no appeal rights to the *RMPAT* from a decision of a council committee.⁴¹¹ It was suggested that the potential for committee members to be influenced by powerful lobbyists makes such appeal

⁴⁰⁸ Interview Surveyor 2, 11th October 2016.

⁴⁰⁹ Interview Lawyer 2 28th September 2016.

⁴¹⁰ *Local Government (Building & Miscellaneous Provisions) Act 1993* s 104.

⁴¹¹ Interview Lawyer 1, 19th September 2016, Interview Planners 1 & 2, 20th September 2016.

rights essential.⁴¹² Consideration by the Supreme Court pursuant to the *Judicial Review Act 2000* (Tas) is the only pathway for review.⁴¹³

The power to amend the sealed plan and remove the covenant or easement is unfettered and there is no guidance in the legislation as to the factors to be taken into account in exercising the discretion.⁴¹⁴ Blow J highlighted the scale of the task facing council committees in making a decision to remove a restrictive covenant.⁴¹⁵ As the discretion vested in councils is unfettered, there is no legal duty to determine a 'difficult non-jurisdictional question of law,'⁴¹⁶ such as whether or not the power reserved by a land-owner to exempt land from the covenant existed and had been validly exercised.

Although the discretion is unfettered, as an administrative body a council may exercise the s 103 power only for the purpose of ensuring proper and orderly planning. The council is not entitled to alter the title to land by exercising equitable principles.⁴¹⁷ Part 3 provides that a person adversely affected by the amendment is entitled to compensation to be paid by the person petitioning to amend the plan.⁴¹⁸ Nevertheless, the exercise of that power by a council may indicate it has exceeded its powers. It may be found that the council is seeking to exercise the equitable jurisdiction of the Supreme Court as provided in s 84J of the *Conveyancing and Law of Property Act 1884*.⁴¹⁹

There are uncertainties as to how a council is to exercise the power under s 103, and there are also limits on the scope of the power. The problems presented by

⁴¹² Interview Lawyer 1, 19th September 2016.

⁴¹³ Such review was conducted in *Clarke v Burnie City Council* [2008] TASSC 75 (26 November 2008) and *Nation v Kingborough Council (No 2)* [2003] TASSC 128 (27 November 2003).

⁴¹⁴ *Clarke v Burnie City Council* [2008] TASSC 75 (26 November 2008), [24].

⁴¹⁵ *Clarke v Burnie City Council* [2008] TASSC 75 (26 November 2008).

⁴¹⁶ In *Clarke v Burnie City Council* [2008] TASSC 75 (26 November 2008) the difficult question was whether there was power in the subdivider's successor in title to waive or remove the covenants and whether they had validly done so [27].

⁴¹⁷ *Nation v Kingborough Council (No 2)* [2003] TASSC 128 (27 November 2003); [29]-[32].

⁴¹⁸ *Local Government (Building & Miscellaneous Provisions) Act 1993* s 105.

⁴¹⁹ S 84J provides that the Court may create a statutory right of user over land if satisfied that it is required for reasonable use to be made of the land; the Court is not to make the order unless satisfied there is no contravention of Part 3; see above n 417.

that uncertainty are exacerbated by the lack of a simple and accessible review procedure for aggrieved parties. The s 103 procedure is cumbersome and discourages the removal of easements that may be redundant and covenants that may be contrary to the objectives of planning schemes. If the question “does it work?”⁴²⁰ is asked of the s 103 procedure, the answer must be no; the regulation does not achieve its purpose and is not an effective, efficient means of achieving policy goals.⁴²¹

III CONCLUSION

The empirical research reported in this chapter has highlighted problems arising from the provisions of Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993*. Although some participants stressed the importance of Part 3 as a source of powers and discretions for councils, a common theme of the interviews was the need for review, both of its language and of its place in the planning system. The majority of interviewees expressed frustration with archaic, unclear language, cumbersome procedures, and out-dated policy.

This chapter includes comments on the difficulties arising from the Adhesion Order provisions. The difficulties mean that land-owners do not have a simple, cost-effective mechanism for joining two or more pieces of land. The chapter also discussed sections 116 and 117. Those sections are not an adequate regulatory framework that can deliver quality public open space, recognised as a valuable tool in urban planning systems.

Part 3 includes s 95 that deals with the dedication of public roadways. Due to the link with the land registration system, review of that section will necessitate review of s 111 of the *Land Titles Act 1980* and the case law on which it is based.

Chapter 6 will consider the implications of the provisions under which the lease of part of a block of land will constitute a subdivision. The chapter considers in addition to that of Tasmania, the legislation and case law of jurisdictions other

⁴²⁰ Freiberg, above n 14, 260.

⁴²¹ Yeung above n 139.

than Tasmania. The provisions are an example of ineffective regulation and examination of them reveals problems with the interaction of planning regulation with the land registration system. In Tasmania the uncertainty of the words used to define 'subdivide' adds to the difficulty, as it is unclear what leases fall within their scope.

CHAPTER 6 LEASES AS SUBDIVISIONS – AN EXAMPLE OF INEFFECTIVE REGULATION

Regulatory theory is employed by this thesis as a framework for its study of Part 3 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* as it considers the effectiveness of Part 3 as regulation for subdivision. This chapter considers the effectiveness of the ‘lease as subdivision provisions’ of Part 3. These provisions are common to Australian jurisdictions⁴²² and also to New Zealand⁴²³ and to some Canadian jurisdictions⁴²⁴ and the doctrinal analysis of this chapter illustrates how they are an example of ineffective regulation. Analysis of the provisions in this chapter demonstrates how regulation, through lack of review, can become ineffective. The provisions date from a very different planning environment and their application encourages the development of formalism, being technical compliance with the words of the regulation but non-compliance with its intent.⁴²⁵ The provisions are disproportionate and result in unintended consequences that may include windfall gains to one party resulting from the effect of the regulation.⁴²⁶ As noted in chapter 4, they highlight the complex interaction between the land registration system and regulatory provision for subdivision. They also highlight the importance of reviewing both the content of regulation and the policy underpinning it.

⁴²² *Planning & Development Act 2007* (ACT) s 7(2) ‘subdivision’ includes surrender and grant of leases; *Environmental Planning and Assessment Act 1979* (NSW) s 6.2(1), *Conveyancing Act 1919* (NSW) s 23G(d); *Planning Act 1999* (NT) s 5(3); *Sustainable Planning Act 2009* (Qld) s 10(1), *Planning Act 2016* (Qld) Sch 2; *Development Act 1993* (SA) s 4(1)(c); *Planning, Development and Infrastructure Act 2016* (SA) s 3(1); Western Australia does not include leases as ‘subdivision, but provides separately for planning assessment of leases *Planning and Development Act 2005* (WA) ss136, 139.

⁴²³ *Resource Management Act 1991* (NZ) s 218(1)(a)(iii).

⁴²⁴ *Municipal Government Act*, RSA 2000, c M-26 s 616 (ee); *Land Title Act*, RSBC 1996, c 250 s 73(1).

⁴²⁵ Morgan and Yeung, above n 14, 152 [4.1] quoting K Yeung *Securing Compliance* (Hart Publishing 2004) 11.

⁴²⁶ Black refers to under and over inclusiveness when considering the issue of congruence between a rule and its purpose quoted in Morgan and Yeung above n 151, 153-155 [4.2] *Rules and Regulators* 5-45.

The inclusion of leases of part of a block of land within the concept of subdivision exposes them to the cost and delay of a planning assessment system designed to address the issues arising from the division of a fee simple title. The cost of compliance encourages techniques to avoid the application of the regulation. Parties who fail to submit leases of part of a block of land that are subdivisions to planning assessment risk their being rendered unenforceable or ineligible for registration on title records. The provisions also highlight the conflict between planning instruments focused on the public interest in sustainable development with the principle of indefeasibility that is at the core of the Torrens system.

In Tasmania the problems are compounded, as the language of s 80 of Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* that defines 'subdivide' is unclear, and it is difficult to determine the leases that fall within its scope. This chapter will firstly consider the lease as subdivision provisions generally in the context of the elements of effective regulation. The chapter will then turn to the issues raised by the Tasmanian provisions and finally to the implications of the registration of a lease that is not compliant with planning assessment on Torrens system title records.

I LEASES AS SUBDIVISIONS

In common with the legislation of the other Australian and international jurisdictions referred to in the introduction to this chapter, Tasmania's subdivision legislation includes leases of part of a block of land within the definition of subdivision. The legislation exempts some leases from the provisions, including those affecting part of a building and those defined by reference to their term. The provisions of each jurisdiction are different and the length of the term of the excepted leases varies among Australia's jurisdictions from five years in New South Wales to 20 years in Western Australia.

In Tasmania s 80 exempts the lease of part of a block of land if the term does not exceed or is not capable of exceeding 10 years. Some of the jurisdictions include

licences as well as leases within the provisions.⁴²⁷ Some jurisdictions make provision for executory agreements to lease, as opposed to instruments of demise.⁴²⁸ Although the provisions vary the policy issue at which they are directed is the same.

In Australia, the policy can be traced back to the *Undue Subdivision Prevention Act 1885* (Qld). That legislation was designed to address sanitation and public health problems stemming from the granting of long-term leases of small pieces of land for building purposes.⁴²⁹ A lawyer interviewed for this thesis suggested it is time to revisit and review the policy underlying the issue of leases of part of a block of land as subdivisions and to focus on the evil at which the provisions are addressed.⁴³⁰ He suggested that different types of leases present different threats to orderly planning. Long-term leases of small pieces of land for infrastructure that has some public benefit may be considered a low-level risk compared with leases that result in the cutting up of prime agricultural land.

It is difficult to understand the continued treatment of the lease of part of a block of land as a subdivision, despite the associated costs (of both complying with and not complying with the regulation).⁴³¹ That is particularly so as the decision to include leases as subdivisions in the assessment process was one made in 'the very different commercial situation and social conditions' to those that exist now.⁴³² Not only are the commercial and social environments different, modern planning systems now provide a range of tools for regulators. Those tools include:

- zoning restrictions on the use that can be made of land;

⁴²⁷ *Planning Act 1999* (NT) s 5(3),(4); *Development Act 1993* (SA) s 4(1)(c); *Planning, Development and Infrastructure Act 2016* (SA) s 3(1); *Planning and Development Act 2005* (WA) s 136, 139.

⁴²⁸ *Development Act 1993* (SA) s 4(1)(c); *Planning, Development and Infrastructure Act 2016* (SA) s 3(1). For a comparison of executory agreement to lease and instrument of demise see *Midaz Pty Ltd v Benberg Pty Ltd* (1999) TASSC 66 (7 June 1999) Crawford J.

⁴²⁹ Hood, above n 91,96; see also Queensland, *Parliamentary Debates*, House of Assembly, 13 October 1885, 1029 (S Griffiths).

⁴³⁰ Interview with Lawyer 3, 29th September 2016.

⁴³¹ Efficiency assessed on cost benefit analysis is a characteristic of effective regulation, see above n 140, n141; Freiberg and Productivity Commission of Australia above n 144.

⁴³² Andrew Lang, 'Subdivision by lease' (1988) *Law Society Journal* 66.

- agreements limiting the use of land that can be registered on title records;
- measures designed to assess and control the construction and use of dwellings and buildings; and
- requirements that any change of use of land be submitted to planning assessment.

Nevertheless, despite the changes in the planning environment, reviews of planning regulation that includes leases as subdivisions have in some cases resulted in amendment to increase the length of excepted leases, but have not removed the provisions. By way of example, in Western Australia and New Zealand review of legislation in a bid to streamline planning procedures, resulted in the length of the excepted lease being extended from 10 years to 20 in Western Australia and from 20 to 35 years in New Zealand.⁴³³ In South Australia the change from five to six years was made in response to a representation by a prominent legal practitioner. That practitioner pointed out the provision referring to a five-year lease term was anomalous. Leases in South Australia were commonly granted for an initial three-year term with an option to extend for a further three years.⁴³⁴

Amendment to extend the term of the excepted lease does not, however, address the problems caused by the legislation. The limitations of this means of dealing with the issue were highlighted by the Law Institute of British Columbia in its report on the decision of the British Columbia Court of Appeal in *International Paper Industries Ltd v Top Line Industries Pty Ltd* *Top Line* case.⁴³⁵

⁴³³ s 20(1)(a) of the *Town Planning Act 1928* (WA) and s 136 *Planning & Development Act 2005* (WA); New Zealand, *Parliamentary Debates*, House of Representatives, 6 May 2003, 5312 (Second reading speech M Hobbs). Amendment to the *Resource Management Act 1991* (NZ) was made by the *Resource Management Amendment Act 2003*.

⁴³⁴ South Australia, *Parliamentary Debates*, House of Assembly, 14 May 1985, 4265 (DJ Hopgood).

⁴³⁵ *International Paper Industries Ltd v Top Line Industries Pty Ltd* (1996) 135 DLR (4th) 423; Report on 'Leases of Unsubdivided land and the *Top Line* case' British Columbia Law Institute BCLI Report no 38 July 2005; 6.

The '*Top Line*' case concerned a lease of 51 months of part of a lot of land that the parties entered into without legal advice and without knowledge of the lease as subdivision provisions. The relationship between them soured and when the tenant attempted to exercise the option the landlord refused to grant an extended term setting in motion the proceedings. During those proceedings, the landlord sought to argue for the first time that the lease was invalid. The landlord argued that the lease did not comply with the requirement in s 73 *Land Title Act* RSBC 1996, c 250. That section required that a lease exceeding 3 years that subdivided land into smaller parcels, be an approved subdivision.

The consequent finding that the *Top Line* lease was void ab initio due to its non-compliance with planning assessment triggered what the British Columbia Law Institute reported to be a trebling of litigation as parties sought to have non-compliant leases declared void. The litigation achieved this '... by giving persons a means to escape from their contractual obligations...' ⁴³⁶ The use of the legislation in this way allowed a '...disaster for one party and a windfall for the other', ⁴³⁷

During its inquiry, the Institute received submissions suggesting that a solution to the problems was to increase the term of the excepted lease. The members of the Institute refused to adopt those submissions as a recommendation, stating that the submissions were evidence of broader complaints about subdivision control than the narrow focus on the *Top Line* decision that was its brief.

One of the options the Institute considered was adding a section to provide that non-compliant leases would take effect as licences for the purposes of creating personal rights. The solution was presented by the Institute as a means of avoiding the harsh consequences of the finding that a non-compliant lease was void ab initio. ⁴³⁸ The amendment that was in fact made to the *Land Title Act* RSBC 1996, c 250 was the inclusion of section 73.1. That section provides that a

⁴³⁶ British Columbia Law Institute above n 435, 6.

⁴³⁷ Ibid.

⁴³⁸ Ibid, 15.

non-compliant lease will not be unenforceable as between the parties to it simply by reason of its non-compliance.

Effective regulation is regulation that is an efficient means of achieving a policy goal. The difficulties the provisions present for parties to leases have been the subject of comment for decades. The cost for parties to leases of complying with subdivision assessment is considerable. In *Re Nelson and Tammers Contract*, Smith J acknowledged the argument of counsel that the construction he felt obliged to give to the provisions would cause 'serious and unnecessary inconvenience.'⁴³⁹

In *Benmar Properties Pty Ltd v Makucha*, Thomas J noted that '[i]t is generally undesirable that subdivisions by lease be visited with the same expensive provisions as are thought necessary in order to identify separate titles.'⁴⁴⁰ The enactment of the *Integrated Planning Act 1997* (Qld) prompted these comments:

Practically the provision [s 1.3.2(d) *Integrated Planning Act 1997*] creates unreasonable obstacles in some commercial situations...Placing a further requirement for subdivision approval upon these types of leases results in increased costs and delays for public utility providers, which are eventually reflected in higher prices for the purchaser of the services... The consequence of the definition is that a subdivision application must be made to the relevant local government whenever a lease of this kind is entered into. The local government can impose conditions which are reasonable or relevant...including conditions to ensure that restrictions of the zoning are complied with. ⁴⁴¹

As that observation demonstrates, the necessity for the subdivision that arises on the long-term lease of part of a block of land complicates commercial arrangements. To comply with the planning assessment process increases the

⁴³⁹ *Re Nelson and Tammers Contract* [1952] VLR 391, 396-7.

⁴⁴⁰ *Benmar Properties Pty Ltd v Makucha* [1993] QSC 269 (10 September 1993) 19; see also Lang, above n 432 and Hood above n 91.

⁴⁴¹ Hood, above n 91, 96.

cost to the parties to the lease and results in delay. It is possible that a lease may be affected by objections to the granting of the discretionary permit required by the planning process for subdivision or the permit for the subdivision may be subject to appeal. The lease might not be able to meet the development standards dictated by the zoning of the affected land. That is likely to be particularly the case as far as requirements relating to minimum lot sizes are concerned.

In Western Australia there is a separate planning assessment process for leases,⁴⁴² but even in that jurisdiction there is uncertainty as to what leases are subject to the legislation. *Rosebridge Nominees Pty Ltd v Commonwealth Bank of Australia Ltd*⁴⁴³ concerned a lease that included an option to extend that was dependent on the lessor making a decision to redevelop. The Court of Appeal determined that the lease did not create an option that triggered planning assessment for the lease, as an option dependent on a decision of the lessor was not an option within the ordinary meaning of the word. The judgment does not disclose whether the option was deliberately crafted to avoid the effect of the legislation. The history of the case demonstrates the difficulties caused by the legislation. The lease was originally executed in 1988. Uncertainty as to whether it was caught by the planning assessment requirements led to litigation that was still on foot in 2014.

In jurisdictions other than Western Australia,⁴⁴⁴ leases that qualify as subdivisions must be submitted to the same planning assessment process as the subdivision of a fee simple. In addition to the cost and delay of the process, a

⁴⁴² *Planning & Development Act 2005* (WA) s136, s 139.

⁴⁴³ *Rosebridge Nominees Pty Ltd v Commonwealth Bank of Australia Ltd* (2008) 36 WAR 561.

⁴⁴⁴ In Victoria leases are not routinely registered as the scope of the indefeasibility provision in s 42(2)(e) of the *Transfer of Land Act 1958* (Vic) is broader than that of other jurisdictions and tenants rely on the protection provided by it. WD Duncan & Sharon Christensen *Commercial Leases in Australia* (Thomson Reuters Law Book Co 7th ed 2014) 41, [10.4500]. The Victorian Planning Provisions require a permit for subdivision of land (eg cl 35.06-3). In the same zone a permit is required for a long-term lease for the purpose of accommodation if the lease is more than 10 years with a restriction on the size of the leased area.

lease may not be able to meet standards applicable to 'the conventional notion of subdivision, namely the creation of additional titles out of an existing title.'⁴⁴⁵

The costs of complying with the provisions encourage creative compliance and formalism designed to avoid the effect of the legislation. Butt has referred to such practices as 'somewhat of an industry in drafting (might we say *crafting*?) leases' to take advantage of the statutory provisions.⁴⁴⁶ He reports on the 'somewhat idiosyncratic practice[s],'⁴⁴⁷ that have developed. They include describing the leased property as 'premises.' This was done on the basis that the lease was exempt from planning assessment as it related to part of a building rather than the land on which the building was situated. Another practice Butt refers to is the establishment of a series of successive leases separated by a time gap (perhaps one day) so that 'judicial "accumulation" of the lease terms' is more difficult.⁴⁴⁸ The development of such creative compliance and formalism in response to the provisions is an indication that the members of society affected by them do not view them as relevant, proportionate, and effective regulation.⁴⁴⁹

The costs of not complying with the regulation are also significant. In some jurisdictions (including Tasmania), the statute saves a lease from being void but imports a condition as to planning assessment into the lease.⁴⁵⁰ Failure to comply with the condition within a reasonable time may render the lease unenforceable.⁴⁵¹ In Tasmania failure to comply with planning assessment

⁴⁴⁵ *Benmar Properties Pty Ltd v Makucha* [1993] QSC 269 (10 September 1993) 17; Thomas J.

⁴⁴⁶ Peter Butt, 'Leases and illegal subdivisions' (2012) 86 *Australian Law Journal* 515, 518.

⁴⁴⁷ Peter Butt, 'Conveyancing practice and the law: leases and subdivision' (2002) 76 *Australian Law Journal* 346; see also Peter Butt 'Successive leases for five-year terms' (2007) 81 *Australian Law Journal* 783, 784; Peter Butt 'Accumulating Lease terms: or does 5 x 5 = 25?' (2009) 83 *Australian Law Journal* 77; Peter Butt 'Lease of premises not including land beneath' (2012) 86 *Australian Law Journal* 11, 13.

⁴⁴⁸ Peter Butt 'Accumulating Lease terms: or does 5 x 5 = 25?' (2009) 83 *Australian Law Journal* 77.

⁴⁴⁹ Morgan & Yeung, above n 14, 123.

⁴⁵⁰ *Conveyancing Act 1919* (NSW) s 23F(3); *Real Property Act 1886* (SA) s 223 LB (5); *Local Government (Building & Miscellaneous Provisions Act 1993* (Tas) s 120(1); *Planning & Development Act 2005* (WA) s 140; *Resource Management Act 1991* (NZ) s 225(1)) saves agreements for sale of land (not leases).

⁴⁵¹ *Equuscorp Pty Ltd v Belperio* [2006] VSC 14 (30, 31 August, 1, 6-9, 12-15 September 2005 6 February 2006) [266-274] confirmed on appeal *Equuscorp Pty Ltd v Antonopoulos* [2008] VSCA 179 (16 September 2008) [23-29] Buchanan JA.

requirements for a subdivision is an offence and as an alternative to a fine, a court may order forfeiture of the value of the interest created by a non-compliant lease.⁴⁵²

It may not be possible to register leases that as subdivisions should comply with planning assessment, but do not.⁴⁵³ As proprietors of a registered interest in land, a lessee will be entitled to the benefits of priority, indefeasibility and the transfer of a legal interest in land. A lessor may have a clear obligation under the terms of a lease to register it. A lessee may accept failure to register as a repudiation of the agreement. Such conduct may then be sufficient to deny the lessor resort to the remedy of specific performance and to terminate the agreement.⁴⁵⁴

The difficulties of the regulation may cause problems for professional advisors to parties to leases. For practitioners, a solicitor's advice that leads to a lease not being registered, or being rendered unenforceable may satisfy the 'But For' test of causation of loss. Such loss may arise from the lack of registration or inability to enforce a lease.⁴⁵⁵ That may be so even though the immediate cause of loss is the action of the other party to a lease. That a solicitor acts in accordance with accepted professional practice may also not be sufficient to prevent a finding of negligence.⁴⁵⁶

Costs of regulation may also include the less obvious cost of windfall gain to one party to the transaction. Parties who wish to renege on their bargain have used the lease as subdivision provisions to escape contractual obligations on the basis

⁴⁵² *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) s 81(3).(a).

⁴⁵³ *Land Title Act* (NT) s 66(2); *Conveyancing Act 1919* (NSW) s 23 F(2); *Land Title Act 1994* (Qld) s 65(3A); *Real Property Act 1886* (SA) s223LD(5a); *Local Government (Building & Miscellaneous Provisions) Act (1993)* (Tas) s 90 certificate of applicability of Division 3 may be required by Recorder of Titles; *Transfer of Land Act 1958* (Vic) s 106(1)(a); *Planning & Development Act 2005* (WA) s 147; *Resource Management Act 1991* (NZ) s 226.

⁴⁵⁴ *WD Duncan & Sharon Christensen*, above n 444, 46-47 [10.5000] citing *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 & *Abacist Pty Ltd v Managed Investments Pty Ltd* (1991) Q Conv R 54-3999.

⁴⁵⁵ *Barnes v Hay* (1988) 12 NSWLR 337.

⁴⁵⁶ *Stone James Co v Investment Holdings Pty Ltd* [1987] WAR 363.

that leases that do not comply with planning assessment are void or unenforceable.

A Tasmanian example is the case of *Sullivan v Thurley*.⁴⁵⁷ The case concerned a dispute arising under an agreement to sell a parcel of land that was to result from a subdivision. The agreement provided for a lease to be granted should a subdivision of the fee simple be refused. The council refused to grant permission for a subdivision of the fee simple due to concerns about inadequate drainage. The would-be purchaser entered into possession as tenant in accordance with the agreement. The vendor sought to eject him. One of the grounds for ejection was that to grant the agreed lease was to carry out an illegal act as subdivision permission had been refused. In considering s 462 *Local Government Act 1962* (Tas), Wright J agreed and noted that to grant the agreed lease would be to promote and condone unlawful conduct.⁴⁵⁸

In *Starr v Barbaro*,⁴⁵⁹ the tenants had spent a considerable amount of money developing a palm plantation on the land. They faced significant loss if the landowner succeeded in its argument that the lease was illegal (as a non-compliant subdivision), and incapable of creating any rights for the tenants. The windfall gain to the landlord prompted Powell J to right the wrong incurred by the tenant. A licence in the same terms as the lease was declared in favour of the tenant. Powell J felt that such orders could be justified as 'substantially permitting the satisfaction of the plaintiff's equity, if...so framed that there is no breach of the sections.'⁴⁶⁰

The British Columbia Court of Appeal in the decision of *International Paper Industries Ltd v Top Line Industries Pty Ltd* ('*Top Line*') refused the invitation of

⁴⁵⁷ *Sullivan v Thurley* [1987] TASSC 19 (9 March 1987) .

⁴⁵⁸ *Sullivan v Thurley* [1987] TASSC 19 (9 March 1987) [25]. The vendor/landlord did not succeed on other grounds as Wright J held the notice to quit to be ineffective.

⁴⁵⁹ *Starr v Barbaro* (1986) NSW Conv R 55-315, confirmed on appeal in *Silvio Pty Ltd v Barbaro* (1988) 13 NSWLR 466.

⁴⁶⁰ *Silvio Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 474 (Priestley JA).

the tenant's counsel to carry out a similar 'rescue operation,'⁴⁶¹ noting that it would be 'exceedingly artificial' to do so. The joint judgment declared that to grant the tenant personal rights in the form of a '*Silovi v Barbaro licence*' would be to circumvent the planning assessment regime that was designed to consider issues such as access and environmental impact. Not only that, but the tenant would be exposed to defeat by a third party purchaser. The door would be opened for land-owning developers either ignorant or who appeared to be ignorant of planning assessment requirements, and who sought to avoid them.

In *Taluja v Australian International Academy of Education Ltd*,⁴⁶² Young J applied s 4B(3)(a) of the *Environmental Planning & Assessment Act 1985 (NSW)* that exempted from the subdivision definition the lease (of any duration) of a building or part of a building. Although acknowledging that the case involved not the lease of a building, but 'the mirror reverse' being the lease of land except for some buildings, His Honour felt the exception could still apply. Butt points out that the decision is not necessarily consistent with the words of the legislative definition.⁴⁶³

The dangers of judges seeking to reach a fair result in every case have been highlighted by Lord Neuberger in the 2014 Leane lecture: '[N]ot only is fairness often in the eye of the beholder, but changing or distorting the law to get what seems to be the right result...has significant risks.'⁴⁶⁴ Those risks include the impact and costs of a different decision on appeal; that the law is left in a state of uncertainty; and that what may be just in one case, may be unjust in another.⁴⁶⁵ In commenting on the decision of Powell J in *Starr v Barbaro*, Hargraves J in *Equuscorp Pty Ltd v Belperio*⁴⁶⁶ ('*Equuscorp*') referred to the 'fashion[ing] of a

⁴⁶¹ *International Paper Industries Ltd v Top Line Industries Pty Ltd* (1996) 135 DLR (4th) 423,440 [34-35] per Newbury JA.

⁴⁶² *Taluja v Australian International Academy of Education Ltd* [2011] NSWCA 416, [76].

⁴⁶³ Butt, above n 446, 520.

⁴⁶⁴ Lord David Neuberger 'Equity: the soul and spirit of all law or a roughish thing?' Leane lecture (2014) 88(11) *Australian Law Journal* 802, 811.

⁴⁶⁵ Ibid.

⁴⁶⁶ *Equuscorp Pty Ltd v Belperio* [2006] VSC 14 (30,31 August, 1,6-9, 12-15 September 2005, 6 February 2006), [266-274] confirmed on appeal *Equuscorp Pty Ltd v Antonopoulos* [2008] VSCA 179 (16 September 2008) [23-29] Buchanan JA.

remedy.’ Regulation that prompts formalism, creative compliance and the judiciary to find solutions that exempt leases from its scope, does not meet the standard of effective regulation.

The lease as subdivision provisions are planning regulation reflecting the concern of legislators to protect the public interest in the process of using and developing land. Such public interest considerations influence the judicial interpretation of legislation. Hargraves J in *Equuscorp*⁴⁶⁷ cited the Privy Council decision of *Kok Hoong v Leong Cheong Kweng Mines Ltd*⁴⁶⁸ as he considered the correct interpretation of s 4 *Local Government Act 1919* (NSW) that included within the definition of ‘subdivision’ a lease exceeding five years. The Privy Council decision is authority for the proposition that whether estoppel will lie is not simply a question of statutory interpretation as the public policy underlying the statute is also relevant.⁴⁶⁹

The Privy Council echoed the earlier words of Isaacs and Gavan Duffy JJ of the High Court in *Roach v Bickle*.⁴⁷⁰ The Privy Council stated that where legislation represents public policy, the Court must give effect to that policy despite any evidence that the parties have created by their conduct; the public policy will consequently determine whether an estoppel will succeed. In the words of the joint judgment of the Privy Council delivered by Viscount Radcliffe:

General social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection...or for the protection of others...In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man’s benefit and what is for his

⁴⁶⁷ *Equuscorp Pty Ltd v Belperio* [2006] VSC 14 (30,31 August, 1,6-9, 12-15 September 2005, 6 February 2006), [266-274].

⁴⁶⁸ *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 1993.

⁴⁶⁹ See also N Seddon, R Bigwood, M Ellinghaus *Cheshire & Fifoot Law of Contract* (10th Australian ed 2012) 886, [16.68].

⁴⁷⁰ *Roach v Bickle* (1915) 20 CLR 663; 671

protection are not synonymous terms. Nor is it open to the Court to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands.⁴⁷¹

Hargraves J applied the principle of *Kok Hoong v Leong Cheong Kweng Mines Ltd* and his decision was confirmed on appeal. The *Equuscorp* Courts considered the whole of the transaction before them. They noted that the six successive leases, each less than the five-year term stipulated in the *Local Government Act 1919* (NSW), were interdependent. The rent for each lease was calculated by reference to the rent of the previous lease. Each subsequent lease would be terminated if the earlier one was terminated; all of the leases were signed at the same time and a management contract defined 'the lease' as meaning the series of successive leases.⁴⁷² The public policy justified a 'strained construction' of the legislation, if necessary to achieve the clear intent of the statute.⁴⁷³ Commentary on the *Equuscorp* judgments has suggested practitioners avoid the use of successive leases in a deliberate attempt to avoid the effect of the legislation.⁴⁷⁴

II LEASES AS SUBDIVISIONS IN TASMANIA

The problems that render the lease as subdivision regulation ineffective regulation are compounded in Tasmania because of lack of clarity in the legislation that makes it difficult to determine which leases fall within its scope. The definition of 'subdivide' in s 80 of Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) as it applies to the lease of part of a lot of land is as follows:

⁴⁷¹ *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 1016-1017

⁴⁷² *Equuscorp Pty Ltd v Belperio* [2006] VSC 14 (30,31 August, 1,6-9, 12-15 September 2005, 6 February 2006), [242-243].

⁴⁷³ *Equuscorp Pty Ltd v Belperio* [2006] VSC 14 (30,31 August, 1,6-9, 12-15 September 2005, 6 February 2006), [246].

⁴⁷⁴ WD Duncan 'Subdivision of land by lease: the serious consequences of non-compliance' (Nov 2008) *Australian Property Law Bulletin* 54, 56; Duncan & Christensen above n 444, 55 [10.6210]; Butt above n 446.

Subdivide means to divide the surface of a block of land by creating estates or interests giving separate rights of occupation otherwise than by...

- (a) a lease of a building or of the land belonging to and contiguous to a building between the occupiers of that building; or
- (b) a lease of air space around or above a building; or
- (c) a lease of a term not exceeding 10 years or for a term not capable of exceeding 10 years;...

The words of the section are unclear. The lack of clarity is demonstrated by firstly referring to the exception relating to buildings. Considering whether leases, the original term of which is extended beyond 10 years by the exercise of an option fall within the definition of 'subdivide,' is another example of the unclear words. Do the words mean that a series of consecutive, interdependent leases such as those the subject of the *Equuscorp* decisions, fall within the scope of subdivision?

A *The Exception for Buildings*

As noted above, the exception for leases of parts of buildings is common to the legislation of the jurisdictions that define leases of part of a block of land to be subdivisions. It is nevertheless not easy to be certain that paragraph (a) of the Tasmanian definition of 'subdivide' means that the lease of part of a building is not included within the definition of 'subdivide'. In order to justify that interpretation of the words of the paragraph it is necessary to apply accepted principles of statutory interpretation and to turn to external sources. In construing ambiguous or obscure legislation or where there may be competing constructions, the Court should prefer the construction that best promotes the purpose of an Act, and may resort to extrinsic material to establish that intent, including Parliamentary records.⁴⁷⁵

⁴⁷⁵ *Pipe Networks Pty Ltd v Commonwealth Superannuation Corporation* [2013] FCA 444 (16 May 2013) [87]; s 15 *AA Acts Interpretation Act 1901* (Clth) ss 8A & 8B *Acts Interpretation Act 1947* (Tas); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; 408.

The words of the paragraph were introduced as amendments made by the Legislative Council to the Land Use Planning and Approvals (Consequential and Miscellaneous Amendments) Bill in 1993. They were then carried forward to Part 3 of the Local Government (Building & Miscellaneous Provisions) Bill 1993. Hansard records the intent behind the amendments was to ensure that a division of a building or of land contiguous to a building would not be a subdivision.⁴⁷⁶ The paragraph may accordingly be interpreted so that the words ‘between the occupiers of a building’ apply both to the building and the land contiguous to a building. That interpretation justifies the conclusion that the words of the paragraph mean that the lease of part of a building is exempt from the subdivision requirements. It is unsatisfactory that the meaning of the paragraph is not immediately clear from the words used, and that resort must be had to Parliamentary records to establish their meaning.

B *The Exception for Leases of less than 10 years*

The second question relates to the excepting of leases the term of which exceeds 10 years or is capable of exceeding 10 years. Tasmania’s legislation is the only Australian legislation the wording of which permits the possibility of using options to extend the lease beyond 10 years. In other jurisdictions legislation has been amended to clarify that lease terms extended by the exercise of options will fall within the definition of subdivision. In New South Wales, the *Local Government Act 1919* was amended by the *Local Government (Subdivisions) Amendment Act 1988* (NSW) after comments made by Needham J in *Misiaris v AFC Holdings Pty Ltd*.⁴⁷⁷ Needham J noted several options were available in interpreting s 327AA(2), none of which he found satisfactory. The amendment made it clear that a lease extended beyond five years by the exercise of an option would qualify as a subdivision.⁴⁷⁸ Similarly in Queensland, the *Integrated Planning Act 1997* (Qld) repealed the *Local Government (Planning &*

⁴⁷⁶ Tasmania, *Parliamentary Debates*, Legislative Council, 17 August 1993, 2442 (R Bailey); Tasmania, *Parliamentary Debates*, Legislative Council, 1 December 1993, 5402 (R Bailey), P McKay).

⁴⁷⁷ *Misiaris v AFC Holdings Pty Ltd* [1988] 15 NSWLR 231

⁴⁷⁸ The *Local Government Act 1919* was replaced by the *Local Government Act 1993* and the current definition of subdivision is in *Environmental Planning and Assessment Act 1979* (NSW) s 6.2(1).

Environment) Act 1990, in the process clarifying that terms resulting from the exercise of options were to be included in the period that at the same time was increased to 10 years.

The Tasmanian Supreme Court considered the question of whether leases extended by options qualify as subdivisions under s 80 of Part 3 in *APF Properties Pty Ltd v Robinson Investment Capital Pty Ltd* in 2013 ('APF').⁴⁷⁹ The case concerned a lease of part of a farming property that was structured as an initial nine year term with nine options to extend by 10-years each. The lease structure was chosen as a solution by the parties to the lease after a permit for the subdivision of the fee simple was refused on the ground that the subdivision contravened the state policy preventing subdivision of valuable farming land.

The 99-year lease term enabled the vendor to continue to occupy one of the residences on the farming land after the balance of it was sold. The Recorder of Titles had registered the lease. Blow CJ was prepared to grant discretionary relief to the tenant under the Australian Consumer Law despite its participation in the 'lawful circumvention' of the lease as subdivision provisions.⁴⁸⁰

In reaching his conclusion, Blow CJ demonstrated a different attitude to the policy underlying the legislation and its effect on the construction of legislation to that demonstrated by the Victorian Courts in the *Equuscorp* decisions. Blow CJ held that s 80 should not be given 'an extended meaning', as if Parliament had intended to include options periods within the 10-year limit, it could have said so.⁴⁸¹ It is submitted that there are difficulties with that conclusion, as it does not take into account what is discussed below, namely the ambiguity and obscurity of s 80. It also does not take into account the importance of the policy underlying the provisions.

⁴⁷⁹ *APF Properties Pty Ltd v Robinson Investment Capital Pty Ltd* [2013] TASSC 59 (9 October 2013).

⁴⁸⁰ *APF Properties Pty Ltd v Robinson Investment Capital Pty Ltd* [2013] TASSC 59 (9 October 2013), [41].

⁴⁸¹ *Ibid.*

The words of s 80 refer to a lease 'of a term not exceeding 10 years'. In considering the application of those words to leases, the initial term of which is extended by the exercise of an option, the effect of an option is instructive. An option to renew is '...a right to call for a fresh lease...a fresh demise: a fresh lease with fresh covenants' even if those covenants are identical to the old ones.⁴⁸² Given that, it seems appropriate to interpret the words 'of a term not exceeding 10 years,' as referring to each separate 9-year term of the *APF* lease. However, if that is so, what is the purpose of the words 'or for a term not capable of exceeding 10 years?' If the words refer to each 9-year term, they are redundant. If the words refer to a lease containing options that would result in a total leasehold interest not exceeding 10 years, the 99-year interest created by the *APF* lease could not have come within the exemption and was a lease that should have been submitted to planning assessment as a subdivision.

Tasmania's Parliamentary records reveal that Parliament intended not only that the total leasehold interest not exceed 10 years, but also as the following extract shows, that protection was to apply only to agricultural land.⁴⁸³ Leases of all other land (irrespective of their term) were to fall within the subdivision net. The following extract shows that for the Tasmanian Parliament the 99-year lease that was the subject of the *AFP* decision was exactly the sort of arrangement that constituted subdivision by lease and that therefore needed to comply with the planning assessment regime.

The principle of this amendment is to make it quite clear that if leases are part of a farm or part of a building complex that could be divided into a series of separate leases, provided the term of the lease or the capacity of the lease does not exceed ten years – by a series of options which can be automatically renewed – that is okay...We would not want a lease to be entered into for 99 years; that would completely frustrate and abort any planning principles that might otherwise have been in force, so as I say

⁴⁸² Duncan & Christensen above n 444, 380 [120.4000].

⁴⁸³ Tasmania, *Parliamentary Debates*, Legislative Council, 17 August 1993, 2441-2443 (RF Bailey); Tasmania, *Parliamentary Debates*, Legislative Council, 1 December 1993, 5402 [RF Bailey]; Fact Sheet Local Government (Building & Miscellaneous Provisions) Bill 1993.

the lease could be for a straight ten years, for five years with an option of another five years, or it could be for three years with two successive terms to take it to nine years, and all of those would comply. But if it went for over ten years the danger would be that if it did not come within the exception to the additions of the definition of 'subdivide', it would be unlawful and unenforceable.⁴⁸⁴

The position for leases of rural land is further complicated when the definition of 'block' is considered. As noted in chapter 5, there are multiple definitions of 'block' in s 80. The result of one of the definitions seems to be that a lease of farmland is not subject to the subdivision requirements as it is not a 'block' to which the s 80 definition applies. The possible exception seems to have escaped the notice of not only the parties in the *APF* case, but also of the parties in *Links Golf Tasmania Pty Ltd v Sattler*.⁴⁸⁵ In the latter case, the land to be leased although a coastal strip, was part of a larger grazing property. This possible effect does not seem to be what the Parliament intended, as the above extract indicates that leases of farming land were intended to be subject to planning assessment.

The decision of Blow CJ in the *APF* case demonstrates a markedly different attitude to the effect of the public policy underlying the provisions to that of the Victorian courts in the *Equuscorp* judgments. Similarly in the earlier decision of *Symmons Plains Pastoral Holdings and EB Management Pty Ltd v Tasmanian Motor Racing Company Pty Ltd; Ex Parte the Minister administering the Tasmanian Development Act 1983*,⁴⁸⁶ Zeeman J's attitude anticipated that of Blow CJ to the public policy underlying the provisions. Zeeman J was prepared to grant the equitable remedy of relief against forfeiture to the lessee under a 40-year lease that did not comply with planning assessment.

⁴⁸⁴ Tasmania, *Parliamentary Debates*, Legislative Council, 17 August 1993, 2443 (R Bailey);

⁴⁸⁵ *Links Golf Tasmania Pty Ltd v Sattler* [2012] FCA 634.

⁴⁸⁶ *Symmons Plains Pastoral Holdings and EB Management Pty Ltd v Tasmanian Motor Racing company Pty Ltd; Ex Parte the Minister administering the Tasmanian Development Act 1983* [1996] TASSC 149 (27 November 1996)

Whether or not the underlying policy is out-dated and in need of review, the provisions are founded in public policy that should influence the interpretation of the legislation. The only conclusion that can be drawn from examining the Tasmanian 'lease as subdivision' provisions in Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* is that no clear statement can be made as to what leases of Tasmanian land constitute subdivisions. That conclusion has implications for parties to such leases, given the potential for the leases to be unenforceable or incapable of registration. More generally, the implications of the registration of leases that do not comply with planning assessment highlight the complications arising from the interaction of the Torrens system with the planning assessment system.

III INDEFEASIBILITY AND PLANNING REGULATION

As noted above, leases that qualify as subdivisions but do not comply with the requisite planning assessment process should not be registered on title records. The land registration system is used deliberately as a means of enforcing planning regulation. If such leases are registered they will attract indefeasibility despite being potentially unenforceable at common law. The position of these leases is an example of the broader issues that arise from 'the tension between planning controls founded in public policy and private property rights'.⁴⁸⁷

The case of *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*⁴⁸⁸ brought the potential for the collision to be considered by the High Court. The majority of the Court held that the consent to subdivision under the *Environmental Planning and Assessment Act 1979* (NSW) created a right in personam rather than a right in rem. That finding meant what has been described as a missed opportunity for the High Court to consider the issue of overriding legislation as an exception to indefeasibility.⁴⁸⁹

⁴⁸⁷ Butt, above n 209. See also Christensen and Duncan, above n 206; Edgeworth above n 206.

⁴⁸⁸ *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472.

⁴⁸⁹ Lynden Griggs Case notes on *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2005) 11 *Australian Property Law Journal* 244, 250.

In 2008 Edgeworth traced subsequent case law and concluded ‘...if legislatures wish to override Torrens statutes... they will need to clear a high hurdle in order to make that intention unambiguously clear.’⁴⁹⁰ He pointed to the complexity of the issues to be reconciled when referring to ‘the divergent regulatory regimes’ of planning regulation and the Torrens system.⁴⁹¹

In considering the status of a lease that is non-compliant with planning assessment, the issue to be decided is whether the planning statute demonstrates an intention to override any inconsistent indefeasibility provisions of land registration statutes.⁴⁹² The decision must take into account the need to reconcile the two statutes if possible and that there is public interest in both upholding planning regulation and the indefeasibility provisions.⁴⁹³

More recently Christensen and Duncan have concluded that it is very difficult to predict whether a statute will override indefeasibility and bind successive owners of the land.⁴⁹⁴ They have urged Australian authorities to strive for consistency in the legislative approach to both overriding indefeasibility and the recording and registration of planning instruments, together with an appropriate framework for determining the effect of regulatory instruments on landowners.⁴⁹⁵ They point out that sustainability will not be served if the land management system is dependant on personal obligations of a landowner that can be circumvented by transfer to a new owner who will take the indefeasible title.⁴⁹⁶ Similarly principles underpinning security of title will be eroded unless there is ‘better alignment between Torrens principles and the sustainability agenda.’⁴⁹⁷

⁴⁹⁰ Edgeworth above n 206, 83.

⁴⁹¹ *Ibid*, 97.

⁴⁹² Alison Stanfield ‘Defeasibility of lease registered where plan of subdivision not registered’ (1995) 16 *Queensland Lawyer* 80, 81 referring to *Makucha v Benmar Properties Pty Ltd* [1996] Qd R 578.

⁴⁹³ *City of Canada Bay Council v Bonaccorso Pty Ltd* [2007] NSWCA 351 (10 December 2007) [87].

⁴⁹⁴ Christensen and Duncan above n 206, [4].

⁴⁹⁵ *Ibid*, [2].

⁴⁹⁶ *Ibid*, [4].

⁴⁹⁷ *Ibid*, [5].

The tension between planning principles and Torrens principles is relevant to the issues raised by the lease as subdivision provisions. If there is doubt as to whether a lease should be submitted to planning assessment, its registration on title records whilst non-compliant with planning assessment means that although it may be unenforceable at common law, it will still attract indefeasibility. This was the finding of Thomas J in *Benmar Properties Pty Ltd v Makucha*⁴⁹⁸ whose decision was confirmed by the Queensland Court of Appeal.⁴⁹⁹

Some jurisdictions, including Tasmania, have a statutory provision that imports a condition designed to save a lease that is not compliant with planning assessment from being void.⁵⁰⁰ As the condition is for the benefit of the public and is imported by statute, it seems the parties to the lease cannot waive it and inclusion of such an implied term will not be subordinated to the parties' expressed intent.⁵⁰¹

A Court may also impose a condition that a planning assessment be performed.⁵⁰² If such a condition requires that planning assessment be undergone and that either does not occur or approval is not granted, a lease may be unenforceable as public policy dictates that planning assessment occur.⁵⁰³ Failure to comply with that requirement within a reasonable time may

⁴⁹⁸ *Benmar Properties Pty Ltd v Makucha* [1993] QSC 269 (10 September 1993)

⁴⁹⁹ *Makucha v Benmar Properties Pty Ltd* [1996] Qd R 578. See also Stanfield above n 492.

⁵⁰⁰ S 120 *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas); s 140 *Planning & Development Act 2005* (WA); S 225(1) *Resource Management Act 1991* (NZ); by contrast a non-compliant instrument is void in other jurisdictions - *Planning Act 1999* (NT) s 63(2), *Real Property Act 1886* (SA) S 223 LB(4).

⁵⁰¹ *Equuscorp Pty Ltd v Belperio* [2006] VSC 14 (30, 31 August, 1,6-9, 12-15 September 2005 6 February 2006) [260]; *Equuscorp Pty Ltd v Antonopoulos* [2008] VSCA 179 (16 September 2008) [18-19]. See also N C Seddon R Bigwood & M Ellinghaus *Cheshire & Fifoot's Law of Contract* (Lexis Nexis Butterworths, 10th Australian ed, 2012) 456-457 n 337 and JW Carter & Wayne Courtney, 'Implied terms in contracts: Australian Law' (2015) 43 (3) *Australian Business Law Review* 248.

⁵⁰² *Taluja v Australian International Academy of Education Ltd* [2011] NSWSC 647 (6 July 2011) [77] Young JA endorsed the solution of Ball J at first instance to such effect.

⁵⁰³ *Equuscorp Pty Ltd v Belperio* [2006] VSC 14 (30, 31 August, 1,6-9, 12-15 September 2005 6 February 2006) confirmed on appeal *Equuscorp Pty Ltd v Antonopoulos* [2008] VSCA 179 (16 September 2008).

consequently render a lease unenforceable.⁵⁰⁴ The *Equuscorp* decisions indicate that a lapse of six years exceeded what is reasonable. By contrast, the Supreme Court of Tasmania made no adverse comment on a failure to obtain planning approval after the lapse of 30 years.⁵⁰⁵

A lease that is unenforceable will nevertheless attract indefeasibility, as the Torrens system ‘can operate to turn an otherwise defective title into one that has the imprimatur and the guarantee of the state.’⁵⁰⁶ However, registration cannot guarantee the validity or enforceability of every covenant such a lease contains, as that will be determined under general law.⁵⁰⁷ That consequence raises the question of the impact for the parties to a registered lease of it being unenforceable. The existence of a registered lease on title records can render dealing with the title difficult for the registered proprietor of the fee simple, as the consent of the lessee may be required for registration of certain dealings with the land. That issue raises the question whether a lease that is not enforceable at common law can be removed from the title records.

Torrens legislation gives power to Registrars to correct the Register, although ‘the precise ambit of the powers remains uncertain’.⁵⁰⁸ Registrars may correct under both the slip provisions in the case of obvious clerical error, and (with the exception of Victoria and of South Australia under recent amendment),⁵⁰⁹ what

⁵⁰⁴ As to effect of lapse of reasonable time to fulfill condition *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 Gibbs CJ and *Equuscorp Pty Ltd v Belperio* per Hargraves J [263] and *Equuscorp Pty Ltd v Antonopoulos* per Buchanan JA [18-19]

⁵⁰⁵ *Symmons Plains Pastoral Holdings and EB Management Pty Ltd v Tasmanian Motor Racing company Pty Ltd; Ex Parte the Minister administering the Tasmanian Development Act 1983* [1996] TASSC 149 (27 November 1996); Zeeman J.

⁵⁰⁶ Griggs, Low & Thomas, above n 190, 5.

⁵⁰⁷ *Travinto Nominees v Vlatts* [36] (1973) 129 CLR 1 Barwick CJ, [36].

⁵⁰⁸ Natalie Skead and Penny Carruthers and ‘The Registrar’s powers of correction: “Alive and well” though perhaps “unwelcome”? Part I: The slip provision’ (2010) 18 *Australian Property Law Journal* 32; Penny Carruthers and Natalie Skead: ‘The Registrar’s powers of correction: “Alive and well”, though perhaps “unwelcome”? Part II: The substantive provision’ (2010) 18 *Australian Property Law Journal* 132.

⁵⁰⁹ *Real Property Act 1886* (SA) was amended by *Real Property (Electronic Conveyancing) Amendment Act 2016* (SA) Sch 2 with effect from 4 July 2016 to delete ss 60-63 as part of preparation for the National Electronic Conveyancing system.

have been termed the substantive provisions.⁵¹⁰ Carruthers and Skead note that the exercise of the discretionary substantive correction power would have potentially destructive effects and detract from indefeasibility.⁵¹¹

The limits on the extent of the correction power are said to justify the caution of registrars in the exercise of their power to correct.⁵¹² It seems unlikely therefore, that Registrars of Torrens systems can, or would be prepared to, cancel the registration of a lease that is not compliant with planning procedures, or that fails to receive such approval following registration. Refusal or inability on the part of Registrars to remove instruments that are not compliant with planning assessment from the register means that removal will be dependent on application to the Court under provisions such as s 141 of the *Land Titles Act 1980* (Tas). Section 141 does impose limits on the extent and scope of the Court's power and the further limits imposed by s 149 are noted below.

That result requires an examination of how planning regulation and land registration regulation stand together. The first step in addressing the question of how statutes stand together is to establish an inconsistency as the interpreter should reconcile statutes if possible and seek a way by which they can stand together.⁵¹³

Edgeworth refers to longstanding case law principle, dating back at least to the decision of the High Court in *South-Eastern Drainage Board v Savings Bank of Australia*, that later statutes may make inroads into Torrens legislation where they expressly or impliedly repeal its provisions.⁵¹⁴ Edgeworth's analysis suggests that whether a Court will make such an order will depend firstly on

⁵¹⁰ *Real Property Act 1900* (NSW) ss 136,137; *Land Title Act 2000* (NT) ss 20, 158; *Land Title Act 1994* (Qld) ss 15(2)(B), 19, 160; *Land Titles Act 1980* (Tas) ss 163, 164; *Transfer of Land Act 1893* (WA) ss 76,

⁵¹¹ Carruthers & Skead, above n 508, 149 who refer to *Medical Benefits Fund of Australia Ltd v Fisher* (1984) 1 Qd R 606, 611.

⁵¹² *Ibid.*

⁵¹³ *City of Canada Bay Council v Bonaccorso Pty Ltd* [2007] NSWLR 424 [83] (NSW Court of Appeal). In his article quoted above n 206, Edgeworth analysed the decision at first instance of Biscoe J.

⁵¹⁴ Edgeworth above n 206; 82 – such interpretation being traced back to *South-Eastern Drainage Board v Savings Bank of Australia* (1939) 62 CLR 603.

whether there is a contradiction between a later planning statute and an earlier land registration statute, and secondly whether the later planning statute evinces intent to override the indefeasibility provisions of the earlier land registration statute.⁵¹⁵

Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) is later in time to the *Land Titles Act 1980*. Adopting the principle, of *South-Eastern Drainage Board v Savings Bank of Australia*, its provisions should prevail in case of an inconsistency if Part 3 evinces intent to override the *Land Titles Act 1980*. Support for that proposition is found in s 122 of Part 3 that provides that it is the prevailing regulation for subdivision.

In *Makucha v Benmar Properties Pty Ltd*,⁵¹⁶ the Queensland Court of Appeal considered the matter of such intent in the context of a lease that did not comply with planning assessment requirements. The Court of Appeal confirmed the decision of Thomas J at first instance that the interest of the lessee was not defeasible by virtue of the failure to obtain planning approval for lease as a subdivision. The facts of the case illustrate the difficulties the lease as subdivision provisions can raise.

The case concerned 99-year leases of small pieces of land on which the tenant erected illuminated signs and paid \$1.00 rent per year. The leases were registered on title records. The Court of Appeal referred to the finding of the judge at first instance that the defendant landlord had engaged in a 'sustained commercial raid with a number of oppressive features.' One of those features was the landlord arguing that the leases were subdivisions and so void and their registration invalid.

The Court of Appeal rejected that proposition, holding that there was no evident intent that the *Local Government Act 1936* (Qld) was to render void or unlawful a

⁵¹⁵ Edgeworth above n 206; 94.

⁵¹⁶ *Makucha v Benmar Properties Pty Ltd* [1995] QCA 240 (11 August 1995); *Benmar Properties Pty Ltd v Makucha* [1993] QSC 269 (10 September 1993) 17; Thomas J.

notional subdivision on the ground of noncompliance with its provisions. By virtue of registration, the leases were indefeasible.

As far as the provisions of Tasmania's legislation are concerned, s 81 of Part 3 provides that an owner of land must not subdivide it except in accordance with an approved plan. Section 90 of Part 3 provides that the Recorder of Titles may require a certificate from a council if unsure whether an instrument presented for registration should have undergone planning assessment. It is submitted that neither section demonstrates intent to override the indefeasibility provisions of the *Land Titles Act 1980*.

Given the discretion granted to the Tasmanian Recorder of Titles by s 90 of Part 3, it is submitted there is no contradiction between s 90 and the indefeasibility granted by s 40 of the *Land Titles Act 1980*. The statutes can be read together on the basis that the obligation to submit a lease for planning assessment rests with the registered proprietor of the land. In addition the Recorder has the opportunity to check that such assessment has taken place. It is submitted that once the lease has been registered the interest of the lessee will be indefeasible despite the lease not having been submitted to planning assessment, and despite the lease not being enforceable at common law.

The position of leases under the *Land Titles Act 1980* seems even clearer given that s 149 protects a registered proprietor (including as lessee under a lease), against ejectment except in certain circumstances. The lease will be an absolute bar and estoppel to any action that does not fall within the exceptions of s 149(1). In conclusion, there is no clear intent in Part 3 to override the provisions of the *Land Titles Act* that would enable or justify an order to remove a lease from the Register that does not comply with planning assessment requirements. That conclusion is at odds with the policy, which although perhaps outdated and in need of review, underpins the lease as subdivision provisions.

IV CONCLUSION

This chapter has sought to present the various issues raised by legislation that classes the lease of part of a block of land as a subdivision. The provisions highlight the elements and impact of regulation that is not an effective means of achieving a policy goal. The regulation dates back to a very different planning environment. The cost that parties to leases are exposed to in complying with it is considerable. That members of society affected by the regulation have developed techniques to avoid its application indicates that they do not view it as either proportionate or relevant. Parties to leases have sought to use the effect of the legislation to escape commercial bargains they have made by arguing that leases that do not comply with planning assessment requirements are unenforceable.

The regulation also points to broader and more far-reaching issues. Those issues arise from the interaction of a planning system founded in and focused on public policy and a land registration system that is founded in and focused on the protection of individual rights in land.

Regulation must be reviewed in order for its effectiveness to be assessed and in order for adjustments to be made in underlying policy, wording and application.⁵¹⁷ The Tasmanian provisions under which a lease may be a subdivision cause particular problems. The wording is unclear and it is difficult to ascertain what leases fall within their scope. The problems that arise are compounded in Tasmania. That is a strong argument for review and reform.

⁵¹⁷ Holley and Gunningham's review of Environment Improvement Plans is an example of such review. They note a finding of 'diminishing returns' of the regulation, above n 16, 448 and identify both limitations and the opportunity to make refinements, at 462-464.

CHAPTER 7 – CONCLUSION

This thesis asks whether Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) is effective as regulation for subdivision in Tasmania. That question is posed in the light of proposed extensive reform to Tasmania's planning system that will introduce a single state-wide planning scheme. This thesis concludes that the importance of Part 3 and its role are poorly understood. That lack of appreciation explains the failure to review Part 3 and is in turn an explanation the ineffectiveness of Part 3 as regulation for subdivision in Tasmania.

This study of Part 3 identifies unclear language, redundant policy, and cumbersome procedures that reduce the ability of Part 3 to contribute to the policy goals of Tasmania's planning system. The study also highlights more far-reaching issues, including the potential for conflict between Part 3 and the system established under *LUPAA* and between planning regulation and the land registration system. The findings of this study into Tasmania's subdivision legislation, although necessarily limited in scope, highlight that adequate review of all the components of the planning system and the underpinning policy are essential for the success of the Tasmanian planning system.

The conclusions of this thesis will be presented as three headings.

I - PART 3 AS PART OF TASMANIA'S PLANNING SYSTEM

Planning systems are required to not only take into account the public interest in sustainable use and development of land resources, but are also expected to deliver productivity dividends to the economy. Proponents of development demand streamlined processes, clear language, predictable outcomes, and regulation focused on those outcomes rather than on prescriptive conformity.

In Australian jurisdictions, including Tasmania, planning assessment and control is largely assigned to local government and the performance of planning systems

is under constant scrutiny. Such scrutiny is justified as the regulatory environment created by state governments influences the efficiency and effectiveness of planning systems.⁵¹⁸ Nevertheless rushed reform that is not built on solid legal and policy foundations may lead to incoherence and uncertainty. Rushed reform may fail to adequately take into account complex policy issues that underpin regulation. The complexity facing planning regulation is heightened in the case of subdivision regulation, as it must interact with the land registration system.

Tasmania's subdivision regulation is further complicated as Tasmania has parallel systems, in the planning schemes established under *LUPAA* and the provisions of Part 3. Although Part 3 has received minor amendment, it retains its status as a system of assessment and approval of subdivision and has not been integrated with the *LUPAA* system. Part 3 establishes an unfettered discretion for councils in the assessment of subdivision proposals that sits uneasily with the system established under *LUPAA*. The Part 3 discretions are alive and well and provide a mechanism by which subdivision can be regulated independently of *LUPAA* planning schemes.⁵¹⁹ Council planners and managers identified Part 3 as a source of discretion and powers for councils that enable them to perform the task assigned to them. Nevertheless, as noted in chapter 4, the dual system for assessment of subdivision proposals that exists is a source of uncertainty with implications for the coherence and effectiveness of Tasmania's planning system.

The role of Part 3 is poorly understood and raises the potential for conflict between the Part 3 discretions granted to councils as autonomous legal entities and the standards and processes established for councils acting as planning authorities under *LUPAA*. The effectiveness of a regulatory system is assessed by how well it implements and achieves its policy goal. Effectiveness includes efficiency assessed by cost-benefit analysis. To the extent that Part 3 is not

⁵¹⁸ Productivity Commission of Australia, above n 2, key points.

⁵¹⁹ *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017).

integrated with the *LUPAA* system and the interaction between Part 3 and the *LUPAA* system is unclear,⁵²⁰ Tasmania's planning system lacks coherence and its effectiveness and efficiency will be adversely affected.

II – PART 3 - INEFFECTIVE REGULATION?

This thesis has employed theory as to effective regulation as a framework and structure for its analysis and examination of Part 3. That theory addresses the questions: Why do we regulate? What tests should we apply to regulation? How do we design and maintain regulation so that it is effective?

The stated objective of Tasmania's planning system as set out in *LUPAA* is the goal of sustainable development. Theorists have identified that to effectively perform the task assigned to it, the words of regulation must be clear and accessible to those who are regulated. The regulated must feel a connection with the regulation in order for it to have legitimacy and for compliance to be encouraged. Efficiency is an important characteristic of effective regulation that affects competition, as planning regulation does. In assessing efficiency the costs to be assessed include not only direct financial costs, but also indirect costs such as those incurred due to delay. Review is essential to establishing and maintaining effective regulation.

The empirical research conducted by this thesis and reported in chapter 5 recounts issues raised by Tasmanians obliged to work on a daily basis with Part 3. Those interviewed spoke with frustration of unclear language, inadequate mechanisms to achieve policy objectives, and cumbersome procedures that render Part 3 ineffective as regulation for subdivision.

The problems include unclear language such as that of s 110 of Part 3 (Adhesion Orders). The unclear language of s 110 is one indication that it is ineffective regulation. Perhaps more significantly the failings of s 110 emphasise the lack of

⁵²⁰ The RMPAT in *P Barker & A Woolley v Clarence City Council* [2017] TASRMPAT 15 (30 August 2017) noted that the question of whether the council technically retained its discretion was not one that was for it to determine.

a simple, cost-effective means of amalgamating multiple blocks of commonly owned land in Tasmania's planning system.

The shortcomings of the legislative framework provided by Part 3 are also evident in the difficulties presented by ss 116 and 117 of Part 3. Public open space has been identified as an important urban planning tool, but Part 3 does not provide consistent guidance to councils and developers as to when open space should be required or how cash-in-lieu amounts are to be dealt with. The result is that different councils apply different criteria as to calculation of the value of the contribution or choose options other than the setting aside of land as public open space. Without an adequate regulatory framework, development proposals will not include quality public open space. A single state-wide planning scheme will not be sufficient to achieve the goal of quality public open space without an underlying effective legislative structure.

Section 95 of Part 3 that provides for the dedication of public roadways is out of step with the legislation of other Australian jurisdictions. The section seems to be founded on a misunderstanding of the relevance of English case law of the late nineteenth and early twentieth centuries. The ineffectiveness of both s 95 of Part 3 and s 111 of the *Land Titles Act 1980* is underscored by the practical solutions adopted by those working with Part 3, to the problems they present.

Section 103 of Part 3 provides for the only means of removing redundant easements and covenants that have been created by plans of subdivision. The procedure is cumbersome and expensive. Planning reform focused on a single state-wide planning scheme will not address the problems caused by easements that are no longer relevant. These easements can prevent the use of land and development of land that might otherwise be possible under the provisions of that planning scheme.

The problems identified through the empirical research of this thesis lead to the inescapable conclusion that Part 3 is overdue for review and reform to address

out-dated policy and cumbersome procedures that are a disincentive to sustainable development and the cause of uncertainty, delay and expense.

III – THE LEASE AS SUBDIVISION PROVISIONS

The classification of the leasing of part of a block of land as a subdivision is common to the legislation of all Australian jurisdictions, some Canadian jurisdictions and to New Zealand. Tasmania's provisions are particularly problematic as the scope of leases caught by the definition of 'subdivide' is unclear. The provisions are an example of ineffective regulation and highlight the issues raised by theorists as they consider what it is that renders regulation effective and how such regulation fails to be effective. The costs in terms of both time and money of complying with the regulation encourage the development of techniques to avoid its application. Consequences of the regulation include windfall gains to one party to a lease who may rely on non-compliance with the regulation to renege on a bargain.

The provisions also highlight the tensions between planning regulation and the Torrens system of registration. Indefeasibility of title is central to the Torrens system and may conflict with planning systems focused on sustainable development and the public interest. This thesis has only touched briefly on that issue and it is one that merits further research and study.

IV ISSUES FOR FURTHER RESEARCH

Chapter 1 of this thesis referred to other policy issues that were flagged with interviewees in the invitation letter but not pursued during interviews, as the interviewees were more concerned with issues directly related to their everyday experience with Part 3. As they form part of the regulatory system for planning in Tasmania, these issues nevertheless deserve inclusion in any review of that system.

This thesis identified those issues as firstly, the definition of subdivision as 'development.' That definition means that planning assessment requirements tailored to development (such as timeframes for assessment and advertising)

will apply to subdivision. Reconsideration of the definition of 'development' to exclude subdivision could enable the introduction of planning assessment procedures and processes tailored to the particular challenges and requirements of subdivision. Secondly, a review of both the provisions and role of strata titles legislation and Tasmania's subdivision legislation could lead to adoption of procedures and processes that more flexibly and effectively address the particular issues associated with the division of land. Thirdly, policy changes have been reflected in Tasmania's planning assessment procedures through the adoption of less prescriptive standards. The implementation of such changes is incomplete without review of the relevance of provisions such as the distinction between 'use' and 'development.' Retaining provisions that do not match underpinning policy can detract from the effectiveness of regulation.

V CONCLUSION

Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* is planning regulation, and planning regulation is regulation that affects competition. The benefits, in terms of efficiency and increased productivity, of regulation that affects competition should outweigh the costs. Planning systems impose significant costs on proponents of development, in terms of both financial cost and time. It is consequently important that planning regulation be an efficient and cost-effective means of achieving a policy goal. Review of such regulation is essential to identifying inefficiencies and issues that reduce its effectiveness.

Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* is primary legislation. Primary legislation is especially susceptible to problems that result from lack of review, as '...there are numerous practical impediments in the way of change, even "change for the better".'⁵²¹ Those identified impediments include 'inertia, apathy and acceptance.'⁵²² These explanations are appropriate to the failure, despite the proposal to do so within months of its enactment, to

⁵²¹ M Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press 1983), 8.

⁵²² *Ibid.*

review and reform the *Local Government (Building & Miscellaneous Provisions) Act 1993*.

This thesis has adopted a three-pronged approach to its study of Part 3 of the *Local Government (Building & Miscellaneous Provisions) Act 1993*. Part 3 has been examined through doctrinal and empirical research. The results of that research have been considered against the background of theory as to effective regulation. That examination and consideration leads to the inescapable conclusion that Part 3 is ineffective regulation for subdivision in Tasmania. The case for review and reform of Part 3 is clear, and change for the better is one source of support for reform.⁵²³

The caution expressed in the following comments is appropriate to the reforms to the planning system that are currently proposed by the Tasmania Government.

First the proposal for reform must fit, without anarchy, into the system that is the subject of reform. Secondly, it will involve generally at least, action, movement, advance. Thirdly, the reform will seek to improve things....Reform and proposal for reform imply the improvement, if not the maximisation of the performance of the legal system.⁵²⁴

In conducting its review this thesis has noted the importance of not rushing major reform of Tasmania's planning system and the need for adequate review and consultation in order to avoid delays and uncertainty. Commentators have referred to the danger of introducing a single planning scheme as the tool for implementation of planning policy, without review of that policy. As the problems identified in this thesis demonstrate, that comment applies equally to the need to review the legislative framework for subdivision proposals in Tasmania. The introduction of a single state-wide planning scheme, without adequate review and reform of the policy that underlies it or the legislative

⁵²³ Ibid,10.

⁵²⁴ Ibid, 10.

framework that enables it to be applied, risks increasing the lack of cohesiveness and the inefficiency to which Tasmania's planning system is already susceptible.

APPENDIX

Letter sent in August 2016 to:

Law Society of Tasmania

Planning Institute

Surveying and Spatial Sciences Institute (Tasmanian Division)

Local Government Association of Tasmania

Recorder of Titles

A Study of Part 3 Local Government (Building & Miscellaneous Provisions) Act 1993

What is the purpose of this study? Are there any benefits to the community?

I am studying for a Master of Laws degree by research thesis at the University of Tasmania. My research question is the effectiveness of Part 3 *Local Government (Building & Miscellaneous Provisions) Act 1993* (Tas) as regulation for subdivision in Tasmania.

Regulatory theorists have identified certain elements or qualities of what is effective regulation. Effective regulation should achieve its policy objectives, be an efficient and cost-effective means of achieving those objectives and should be relevant to its context, politically acceptable, clear and accessible and encourage compliance. I hope to produce a thesis that is relevant to members of the Tasmanian community and that will be a useful resource for reform of Tasmania's subdivision legislation should that eventuate.

Invitation to participate and why

I am writing to invite members of the legal, surveying and planning associations as people who routinely deal with an apply Part 3, to participate in interviews to be conducted by me between late September of this year and the end of February next year. I anticipate that the interviews will last for approximately 30 minutes

and I will travel to attend the interviews at the interviewee's place of work (whether that be Hobart, Launceston or the North West) if that is appropriate. My research is self-funded and I am consequently unable to offer to pay for the cost of the interviewee's time. I would be grateful if you would distribute this letter to your members and invite those members willing to participate to contact me at this email address (utas address supplied) to indicate their consent and to make arrangements for the interview.

What am I asking for?

I will outline the characteristics of effective regulation and ask four questions (having noted that no confidential or client information should be disclosed to me) and record answers.

1. How does the interviewee address the issue of leases that fall within the definition of subdivision? How are such leases dealt with by local government planning assessors?
2. How does Part 3 integrate with the land registration system? What issues arise for mixed general law/Torrens land? Are restrictive covenants considered in subdivision proposals?
3. Does the distinction between 'use' and 'development' serve a useful purpose? And does it cause any difficulties?
4. How does Part 3 integrate with the planning system established under *Land Use Planning and Approvals Act*?

I will then invite comment from the interviewee on his/her views of whether Part 3 constitutes effective regulation and whether there are particular issues for the interviewee dealing with subdivision proposals in Tasmania.

What will happen to the data? And how will the results be published?

I will record the interview by handwritten notes and will provide a copy of the transcribed record to interviewees for comment, amendment and approval as soon as possible after the interview and before publication. The comments will be collated and compared to identify any common themes and as base for further research and doctrinal analysis if required. The results will be reproduced in the

thesis as part of the evaluation of the legislation. The data will be kept securely for 5 years on the University's network in accordance with standard research data procedures of the University of Tasmania. After 5 years, the data will be deleted from the University's network.

Are there any risks for interviewees?

Interviewees will not be identifiable in the thesis and will be referred to by reference to profession and a number. The research data records of interview will enable the interviewee to be linked to the published comments but the interviewee will not be identifiable in the published work or in dissemination of the findings. Interviewees may withdraw from the study at any time before its completion and the information they have provided will be destroyed and deleted from the stored data records.

Any questions about the study?

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H 0015919.

Yours Sincerely

Ann Hamilton

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